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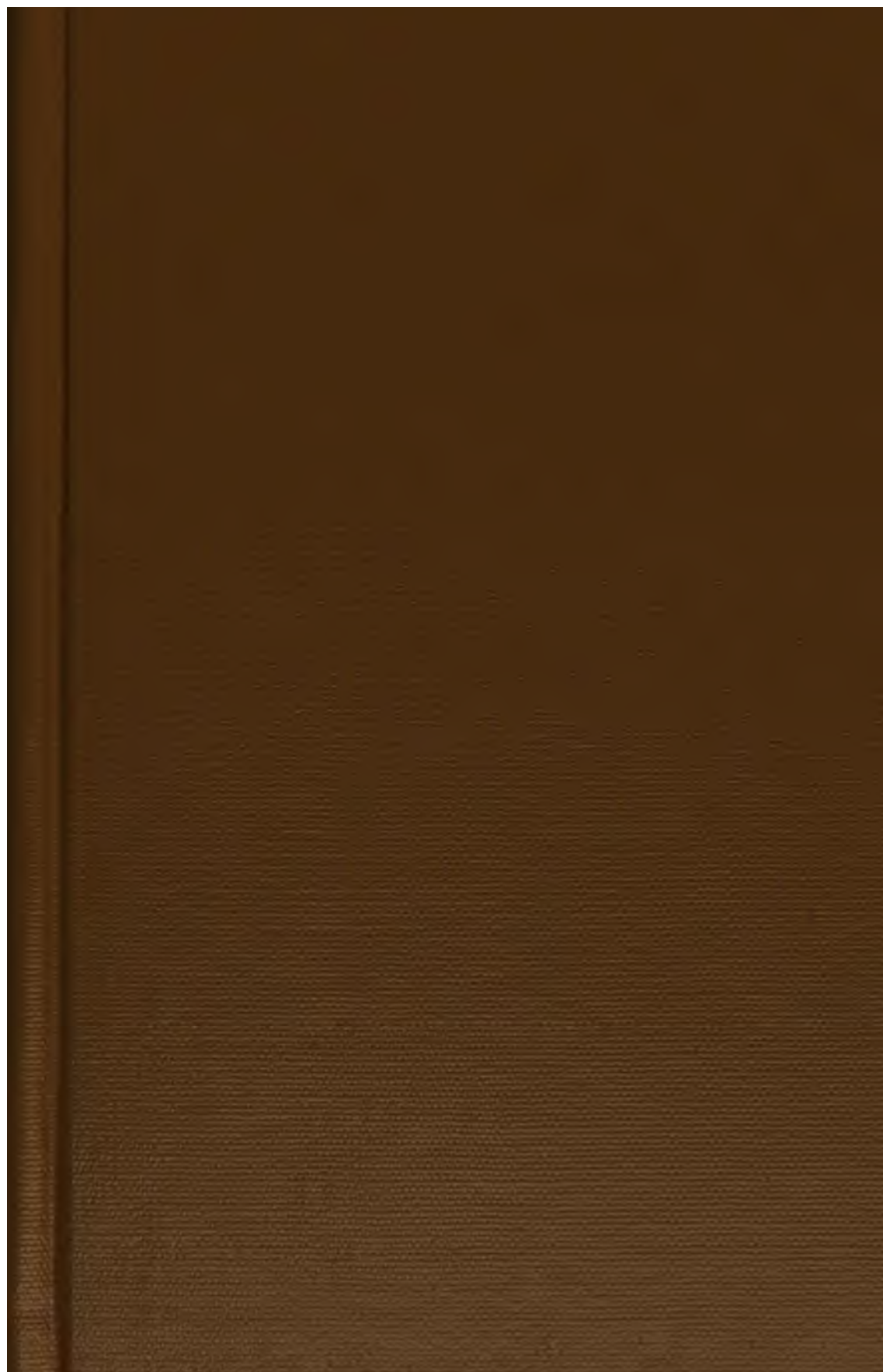
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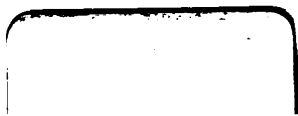
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COMMERCIAL PRECEDENTS

SELECTED FROM THE COLUMN OF

REPLIES AND DECISIONS

OF THE

NEW YORK

JOURNAL OF COMMERCE.

—X—

*AN ESSENTIAL WORK OF REFERENCE FOR
EVERY BUSINESS MAN.*

—X—

—BY—

CHARLES PUTZEL, OF THE NEW YORK BAR, AND H. A. BÄHR.

HARTFORD:
AMERICAN PUBLISHING COMPANY.

1882.

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CHARLES PUTZEL AND H. A. BÄHR.

TO
DAVID M. STONE,
EDITOR-IN-CHIEF OF
"THE NEW YORK JOURNAL OF COMMERCE,"
THIS VOLUME IS
RESPECTFULLY DEDICATED.

PREFACE.

"THE commercial, equally with other branches of the common law, grew up out of personal usage, and the principle of growth or adaptation to the wants of the commercial world, remain inherent in the system." Estimating the importance of this book with reference to the amount of property afloat in the shape of bills, notes, and checks, the magnitude of our shipping interests, the complexity of our business in all its branches, there never has been a time when it called for greater accuracy and discrimination, or invited the attention of merchants and professional men with motives of equal urgency.

"*The New York Journal of Commerce*," for more than a quarter of a century, has been the recognized authority throughout this broad land, in commercial matters viewed in the most comprehensive sense of the term. Among the departments of this journal, its editor, David M. Stone, Esq., has for many years devoted one or more columns daily, owing to the demands of many thousand subscribers, to answering the questions of these subscribers on the important and every-day usages and principles employed in every known business of the civilized world. From these columns known as "Replies and Decisions," we have selected with great care and with the combined judgment of a lawyer and of a business man, those which are in vogue to-day and of vital importance to every business man as well as to those who have relations with business men, particularly the lawyer.

The selections comprehending the usages and principles in practice in the numberless branches of business, are arranged alphabetically, according to the subject-matter, and under their appropriate heads and subdivisions, together with a careful index alphabetically arranged and subdivided, so as to enable the most indifferent reader to find the question or subject-matter desired, giving the number of the page, and the number of the question on the page. We have avoided repetition of matter, and presented the "Replies and Decisions," as they appeared in "*The Journal of Commerce*," and hence disclaim any originality for the subject-matter. Our selections from the files of "*The New York*

▼

"Journal of Commerce," are taken for a number of years sufficient to embrace the many heads or subject-matter as appear in the table of contents. They contain the usage, principles, and authorities, and are free from technical language save where technical terms are absolutely necessary, and so as to be understood by every one. This book will by no means rank among commercial law books, for it does not contain the principle or the theoretical basis of such a work, and it is far from its province. It is the actual, applied and every-day usage of commerce which makes this an essential work of reference for every man in business, and applicable to all the states throughout the union, for it is the common law, and wheresoever the statutes of a particular state govern the question, the name of the state is given in the body of the book, as well as in the index. Where the matter should appear under more than one head in the index, it is cross-indexed, so as to insure its being readily found as well as to avoid repetition in the body of the book. The arrangement of the subject-matter, including the classification of topics and a complete index of every question, will be found to be highly practical in its simplicity.

From the encouragement given by bankers, exporters and importers, manufacturers, and lawyers, to this undertaking, it is to be hoped that this compilation may be of great and general use to the business and professional men throughout the United States.

CHARLES PUTZEL,
H. A. BÄHR.

NEW YORK, JULY, 1881.

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TO THE READER.

In the back part of this volume is a full alphabetical Index of the 1,888 cases contained in the work.

Any particular case can be easily found by looking in the Index under the appropriate head and then referring to the number of the question and number of the page as given.

COMMERCIAL PRECEDENTS.

ASSIGNMENTS.

(SEE ALSO INSOLVENCY.)

1. In 1875 A made an assignment for the benefit of his creditors. The assignment was duly filed in this State (N. Y.) and New Jersey, and the assignee settled with all the creditors by compromise. One party held notes against A, who also signed the compromise and received his dividend, but did not surrender the notes by some inadvertence. A now fears that this party may or has assigned these notes to other parties, and these parties may, at some future time, demand payment, notwithstanding that the original holder received the dividend and signed the general release. The assignee was not aware of the existence of these notes, A merely putting the amount of the indebtedness on the schedule: neither did the assignee advertise to limit creditors, there being so few and all known. Now what course would it be best to take? Have the assignee advertise, or let it remain in abeyance, the assignee still holding all the papers?

A. If the debt was properly discharged under the assignment, the notes are worthless. No one can take them after their maturity and acquire a title to them, however innocent he may be, as they cease to be negotiable, and the receiver takes a note after it is due subject to all the equities between the original parties. If A is uneasy he can compel the delivery of the notes, or a statement that they are destroyed.

2. A party takes extension, and gives notes secured by a mortgage on real estate. The last note is protested, the party having assigned. Can an individual creditor compel the trustee to have the mortgage foreclosed at once? Or must there be unanimity among the creditors? Debtor lives in Ohio and the property is situated there.

A. On the motion of a creditor the courts will compel the trustees to foreclose, if no good reason can be shown to the contrary.

3. A broker fails and makes a general assignment of all his effects for the benefit of his creditors. Among his creditors is an insurance company, having to his credit on its books an amount of script which

previous to his failure he had sold and received pay for, but neglected to transfer. Now has that insurance company a right to take that script in payment of its claim, or does it belong to the party who bought and paid for it?

A. We understand the scrip to be negotiable, and if the certificate was sold and delivered in good faith, the buyer would have a title not subject to the private account between the company and the broker, even though it had not been transferred on the books of the corporation.

4. A party made an assignment to assignee selected by creditors of all stock on hand, for which they signed a paper to release party from all claims. Then the assignee sold the stock and received about \$375 for same at auction, he has offered the dividend to the creditors, but being so small none have called to get same, and it is now over five years. In two years the claims will be outlawed. Please let me know what is to be done with the money, does it go back to the party making assignment at the time, or what is to be done with it?

A. It would be unsafe for the assignee to make this decision for himself, or we for him. His proper course is to apply to the court having jurisdiction for an order discharging him from the trust, or otherwise making disposition of the funds.

5. B makes advances to A on warehouse receipts of merchandise in store to two-thirds the value of goods.

A gives C, a creditor, a regular assignment of the margins on those goods.

D, a creditor, obtains a judgment and attaches the margins.

The question is, who is entitled to the surplus when goods are sold, C or D? In other words, will a judgment preclude the assignment?

A. The preceding assignment, if legal and regular, will hold the surplus.

6. MICH.—A party in Michigan makes an assignment; will an attachment on goods hold, providing bonds of assignee have not been filed?

A. The Michigan insolvent law vests all the property of the debtor in the assignee from the execution of the assignment, which, on being recorded, is allowed the same effect as a deed of real estate, without reference to the assignee's bonds, of course therefore the property cannot be attached by any creditor, under the State law, after that time.

ATTACHMENTS.

1. How can a judgment be collected from a clerk who draws his salary weekly in advance? Is there any process by which his employers can be made to disclose what wages he is receiving, and withhold a portion each week until the debt is paid?

A. The attachment process can only be employed where something is owed by the attachee or employer to the judgment debtor, and we know of no process by which unearned wages can be reached on execution.

2. We wish to secure a debt of a large amount by suit in the Supreme Court of this State (N. Y.). The defendant being a non-resident, we propose to attach his property, and would like to know what an attachment will cover besides his stock. Will it apply to his cash in bank, and to what collections he may make from his customers after the date of the issue of the attachment?

A. If a general bank deposit were held to be in specie, the property of the depositor, there would be no question on the subject; but, the courts holding it to be a mere debt, this seems to lead to the conclusion that such a deposit, due a non-resident, is not property within the State capable of attachment. Section 648 of the Code of Civil Procedure, according to Commissioner Throop, was prepared with great care, in the hope of settling most of the puzzling questions with respect to the attachment of debts, but though the section declares that a cause of action arising out of contract may be attached, and specifies various classes of obligations made by non-residents as capable of attachment, yet it does not in terms cover the case of a debt due a non-resident. This reasoning applies equally to both branches of the inquiry presented by our correspondent, unless the collections may be reached in the shape of actual property of the non-resident debtor, and not in the character of a debt due him. Nevertheless, both cases seem to be fairly within the principle in *Russel v. Ruckman*, 3 E. D. Smith, 419, where the court upheld the attachment of a promissory note made by a resident, payable to the non-resident debtor in the attachment proceedings. If a note, being mere evidence of a debt, can be thus attached, there seems to be no sufficient reason why a non-resident's bank balance cannot be held; and we accordingly believe that, following that decision, both balance and collections can be so covered.

3. R. I.—Will an assignment of wages unearned hold good from attachment, under the following circumstances, in this State: A gives B an order on the company that employs him, on the first of each month, for all money that he may earn or which may be due him the present month, and the company accepts the above order in favor of B?

A. We know nothing in the Laws of Rhode Island to render such an assignment invalid, provided that A owes B at the time of the assignment, and that it is made in good faith to secure the debt and not to protect the wages, so that they may be applied to A's own use or benefit. If this last be the case, we do not think the assignment would hold good against a creditor whose debt ante-dated the transaction.

4. R. I.—Are the officers' and sailors' (including engineers of steamers of the merchant marine) wages due liable to attachment for their debts contracted while on board or on shore?

A. The Federal law provides that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrest from any court" (U. S. R. S., sec. 45, 36). We know of no such exception in favor of officers or engineers. By Rhode Island law, mariners' wages are exempt from attachment until after the termination of the voyage on which they have been earned.

BANKS.

NATIONAL AND STATE.

1. A note due to-day is presented at the bank for payment at 11 o'clock A. M. The note is protested for non-payment. Can the holder of such note collect the protest if the maker of such note can prove that he had the money at the bank at 3 o'clock P. M.?

A. We suppose, although it is not stated, that the note is payable at a given bank. The maker, by that promise, is bound to have the money at the place appointed at all times within banking hours, so that if the note is presented five minutes after the bank is opened in the morning, and payment is refused, the promise is broken, the paper is dishonored, and it may be protested without presenting it again. But if the maker can find the holder at any time during the day and tender him the money, he can save himself from any costs. .

2. We deposited in a New York bank a check drawn upon the First National Bank of Newark; the latter bank having failed, the

New York bank notifies us that they have deducted the amount of the check from our account, but do not return the check to us, consequently we have neither the money nor our check. If we had the latter we could get the amount from the drawer, but he refuses to give a new check until the old one is surrendered to him. Under these circumstances has not the New York bank become a creditor of the Newark bank, and have we not ground of action against it to recover our deposited check or its equivalent?

A. It may be that the check went into the Newark bank and was canceled; if so, under the decision of our Court of Appeals the bank cannot return the check, and the payee has lost the money. If the check has not gone in, the bank should return it, and can be compelled to surrender it.

3. When a bank certifies a check, does it charge it to the account of the depositor and retain the money for the payment of it?

A. The bank, when it certifies a check, charges the amount to the depositor precisely as if the same had been paid, and (with the exception above noted) holds itself bound to pay the check on presentation.

4. A bank certified two checks. One was forged and the other raised. Both checks came into the possession of an innocent holder, who, relying on the bank's certification, gave value for them. Has the liability of the bank in such cases ever been determined by the Court of Appeals; if not, what is the prevailing decision of the lower courts?

A. The bank is liable to a holder in good faith for the forged check, but our highest judicial tribunal (N. Y.) in a decision severely criticised by us, has taken the ground that the bank is not liable for a raised check it has certified, and even after it has been paid such a check may upon discovery recover the money of the presenter.

5. Has there ever been a decision of our courts in regard to the liability of a bank which receives on deposit from a dealer a check drawn on the same bank by another dealer, whose account proves to be overdrawn at the end of the day's business, and who fails to make it good? In other words, does not the receiving of the check by the second teller (who is an officer of the bank) amount to the same as the certification of the same by the paying teller? If not, how does the subsequent certification, on the same day of other checks of the same party, affect the case?

A. There is a decision in our Court of Appeals holding a

bank liable for a check on itself which it receives on deposit and passes to the depositor's credit, whether the account against which it is drawn is good or not; and in a recent California case the court quoted the New York decision as governing. But this was under the old system of banking, where the cashier was the one both to pay checks and to receive deposits. Now all this is changed, one teller receives and another pays. If the depositor wishes to have the check hold good without recourse to himself, let him present it to the paying teller and draw the money or have it certified. If he deposits without such precaution, we think that he should be held to have waived his right, and should stand as the indorser of the check, precisely as if it was drawn on another bank. A Philadelphia judge took this view of it in a very important case. The courts here might still follow the old precedent (which is latest law) in this State (N. Y.), but it will be modified by modern custom in due time.

6. A depositor deposited with this bank for collection on the 20th of July a check upon a bank in this city (N. Y.) for \$2,500, which check was sent through the Clearing House as usual on the 21st and pronounced good and paid by the drawee bank; after receipt of the money, or equivalent thereto (no notice by one o'clock that said check was spurious having been received), our bank paid to depositor a portion of said check.

On the second inst. the drawee bank sent a notice that it had discovered said check had been "raised" from \$25 and demanded a refund of balance.

This bank had no interest in the check, not even having credited it to account of depositor until after one o'clock on the 21st, simultaneously charging him the amount paid him. We hold the balance undrawn on said check, but for the deficit which bank is responsible, the bank receiving the deposit presenting it for payment and receiving the money on it and then parting with it, or the bank which paid it and twelve days afterward notifying its having been "raised?"

This bank did not negotiate the check for value, having no interest in it whatever, the only "currency" it nominally gave to it being in its list of "debit checks" in the clearing on the 21st.

A. We have noticed at very great length the decisions in this State (N. Y.) giving to a bank which had paid money on a raised check drawn upon itself the right to sue for and recover the over-payment. Our Court of Appeals held that the drawee bank was not bound, although it had certified the check after it was raised, and the holder took the check upon such certifica-

tion. We criticised the decision, and on the strength of our criticism application was made to the Court for a re-hearing of the case, but this was refused. We had not previously expressed any opinion on the case, but we have always considered it a very inequitable decision. The principle is sustained in *Bank of Commerce vs. Union Bank*, 3 N. Y. (3d Com.), 230.

7. In certifying a check does a bank guaranty the payment of the same whenever presented? or simply certify that the amount on the check is to the credit of the drawer in the bank at the time the check is presented, without thereby guarantying its payment?

A. It was formerly supposed that the certification promised absolute payment of the check when properly presented; but our Court of Appeals, in evident ignorance, as we think, of the effect of their decision, or of the real nature of the question upon which they passed, have decided that if the amount of the check has been altered since it was drawn, the bank cannot be held to pay the altered amount, although the certification was placed upon it after the alteration. But if the check has not been tampered with, the bank after certification is held for its payment.

8. If a Richmond check is made payable to A, of New York, and he deposits it in bank and stamps on back "For deposit only in Bank of New York for credit of A," does this require that the forwarding bank should guaranty the indorsement, or does not the fact of its coming from said bank prove its genuineness?

A. The Bank of New York in collecting the check in that way does guaranty the indorsement in any case, and is responsible for its genuineness.

9. If A gives a check to an employee of B, payable to the order of B, can the employee at once get the same certified at the bank where it is payable, or is it necessary that B indorse the check before the bank is obliged to certify it?

A. A bank is not obliged to certify a check at all, and it does so as a matter of courtesy and accommodation to the holder, who prefers such certification to payment. In granting such courtesy and accommodation the bank may impose such conditions as it chooses to prescribe, and if the holder refuses to accept these, it may decline to certify. Some banks insist on indorsement by the payee before certification, unless the check is presented on the

part of the drawer, but we do not defend the requirement, nor believe it to be justified by any sound policy. But what can the clerk do if such certification is refused? He cannot ask for payment because the check is drawn to order and not yet indorsed. He must get his firm's indorsement before he can present the check for payment, and when thus indorsed, then the bank will offer to certify it.

10. The following notice is in several of the New York banks: "While this bank will use due diligence it will not be responsible for checks paid, although payment on the same may have been stopped." Is a bank responsible provided it pays checks on which payment has been stopped? Does the above notice release the bank from or change the nature of its responsibility in any way? Is there any distinction in the above case between notes, drafts, or checks?

A. We do not think the above "notice" likely to prove a sufficient defense if a bank pays a check or order after it has had full and distinct notice in writing that payment has been stopped. In plain terms we do not believe a bank can charge the payment of a check to its depositor after he has distinctly in writing, with a full description, countermanded the order.

11. A, of Boston, telegraphs C, of New York, to invest \$1,000 and directs C to draw on him for the amount at sight through the National Bank of New York. At the same time, by request of A, the National Bank of Boston telegraphs the National Bank of New York to pay C's draft on A for \$1,000, and the National Bank of New York pays C the amount of the draft as requested. In case A fails to pay C's draft, is C liable for the amount, or will the National Bank of Boston be held liable?

A. In case C's draft comes back unpaid, he can be held to pay it. If neither A nor C can pay it, the National Bank of Boston stands in the gap.

12. I give a person a check on a bank for \$100 which is raised by the party to \$2,100, and is cashed by the bank for that amount. Provided the person who raised the check cannot be found, who must lose the \$2,000, the drawer of the check or the bank?

A. Unless the check has been so carefully drawn as to invite alteration, the drawer cannot in any case be charged by the bank with a greater sum than he included in the order as it left his hands. In this State (N. Y.) the Court of Appeals has

decided that the drawee may recover of the payee or of the bank through which it was collected the extra amount paid; but if this cannot be done the drawee must lose it.

13. John Smith draws his check for \$100 against his account in the Iron National Bank to the order of Moonshine, Cough & Co. It next becomes the property of the Hundredth National Bank of Philadelphia, which has paid the money for it, and which indorses it and sends it to its New York correspondent, say the Four Hundredth National Bank, for collection and credit. The correspondent in turn indorses it and collects it of the Iron Bank through the regular Clearing House exchanges. Upon its reaching the hands of the Iron Bank teller, the writing upon the back purporting to be the indorsement of Moonshine, Cough & Co. is found to be utterly illegible. The check having been indorsed by the two banks through which it passed, is paid by the Iron Bank and charged to Smith's account. Subsequently, upon settlement of Smith's bank book and return to him of his canceled checks, he is dissatisfied with the writing on the back of this check, declares it not the genuine indorsement of Moonshine, Cough & Co., and refuses to allow the charge against his account. Suppose one of the regulations of the New York Clearing House be that "The written indorsement of a bank, member of the Clearing House Association, shall be held as a sufficient guarantee and responsibility to any other bank being a member of the same, for all previous indorsements, without any special indorsement for guarantee, provided that such indorsements shall not be construed to supply, or as a guarantee for a missing indorsement," and upon investigation this writing prove not to be the genuine indorsement of the firm aforementioned:

Who must bear the loss?

Is a bank bound to know the indorsements to be correct which may cover the back of a check drawn upon it, above the indorsement of the bank or party from which it receives the check, in order to secure it against loss in case one or more of such indorsements, legible or illegible, prove upon investigation after payment to be not the genuine indorsement of the party named in the body of the check?

The writing on the back of Smith's check being an illegible scrawl (to any one not familiar with it), should it be held to be an "absence" of or a "missing indorsement"?

A. The Hundredth National Bank of Philadelphia must lose the money unless it can recover of the person from whom it received the check.

The drawee bank is not bound as to the correctness of any of the indorsements, except for its own protection. If the check comes through any other bank or responsible party, the latter is held for the genuineness or sufficiency of the indorsements with or without any Clearing House rule to that effect.

The illegibility of the indorsement, if the writing was taken to be the signature of the original payee, does not make the case one of "missing" or "absent" indorsement. It appears that the indorsement was a forgery; the next genuine indorser is therefore the loser, unless he can detect the person from whom he had it and recover the money.

14. We deposit a country check at our bank, and the same is passed to our credit. The check is lost through the mail. Has the bank any right to charge the check back to us?

A. The bank has no right to charge the check back, being responsible for the loss; but it has the right to ask the co-operation of the depositor in securing a duplicate from the drawer.

15. Some time since we were notified by a correspondent that he had not received check which we had sent him. On a second notification of the same fact we advised with our bank, and by their direction we issued duplicate check, they agreeing to stop original. On examination of checks returned, we find both checks, original and duplicate, the party dishonestly or otherwise using both, and our bank not refusing to receive the original after agreeing to do so, and furthermore now disclaim any responsibility whatever.

A. The drawer of a check has a right, as far as the drawee is concerned, to countermand its payment, and the bank after accepting such a notice pays the check at its own peril. As far as the public is concerned, however, the drawer is liable to any one who holds the lost check duly indorsed, in good faith for value, and such holder, if the bank refuses payment, can collect the same from the drawer. The bank in the case cited may "disclaim any responsibility," but it cannot lawfully charge that countermanded check it agreed not to pay to the drawer's account; and if it does, and refuses to let him draw the sum thus charged, the courts will convince the officers of their error. The receivers of the check who indorsed and collected both can be made to return the money, and, if done by design and not an accident, be punished for their dishonesty.

16. A presents B's check for \$—— to the bank on which it is drawn. The drawer B has not sufficient money on deposit in said bank to meet the check. Has A (the payee) then the legal right to demand of the bank that the amount standing to the credit of B shall be paid to him on his surrendering the check? And would the bank

be held harmless by either refusing or complying with the demand? And if the bank complied with the demand, could it charge to B's account a portion of the amount of the check, that is, the amount paid A on its surrender?

A. This is a very important question and has been widely discussed. Morse on Banking says. "The better rule perhaps would be, to save misunderstandings and complications, that if a bank cannot pay in full it not only may not, but must not, pay at all." The writer supports this with the following argument:

"The drawer has not requested the bank to make a part payment. He has demanded that it do a certain act, to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order expressed without alternative to pay that specific sum."

But this view has been successfully combatted by other writers, and Daniel on Negotiable Securities (vol. 2, page 539), says:

"It is quite clear, we think, that unless the holder will surrender the check the bank is not obliged to pay it in part, for it is entitled to the check as a voucher. But if the holder offers to give up the check on receiving part payment, we cannot perceive that the bank would be warranted in refusing such part payment; and so, likewise, if the holder would place a sufficient sum to the drawer's credit, to make the check good before drawing out the amount."

In a case tried in the Court of Common Pleas of Philadelphia (Bromley v. Com. National Bank), in 1872, it appeared that the payee of a check for \$725 presented it for payment. The bank had but \$229.92 to the drawer's credit, and the teller therefore declined. The payee then demanded such balance on account as the bank held. This was refused; and he then offered to deposit to the drawer's credit sufficient money to make the check good if the bank would then pay it. This the bank also declined, but the court on trial awarded to the holder of the check that money, and said that having first presented a check that covered it, and offered to surrender the check for it, he was entitled to it. In view of this case, the best writers say that if the holder offers to surrender the check and accept for it the balance less than its

face which the bank may hold, the drawer would have no right to complain, and, as the payee consents, the bank would have no right to refuse it.

17. A draws a check on a bank payable to B, and B indorses the same in blank. C presents the check for payment and the teller asks C to indorse it; C refuses. Can C protest and collect damages of either the maker of the check or of the bank? and can A collect damages of the bank for refusing to pay his check?

A. The only object in asking C to indorse is to have him identify and guaranty the endorsement of B. If C declines and the bank still refuses to pay, C can protest the check, but the bank would probably pay it to the notary who made the demand before protest. If not, and protest is made, C has still no claim for damages on the bank, but he can collect principal and costs of A. A can collect of the bank all that any jury would allow in the way of damages; but if the bank showed by proper evidence that they did not know the signature of B, and asked C's indorsement as a guaranty of its genuineness, the verdict would not probably carry any damages beyond the cost of protest.

18. Can a bank legally refuse to give credit next morning for a check returned the previous afternoon, after all the officers had left and the bank closed?

A. As we understand the position, the bank may return the check at any time that afternoon or early the next day, and if charged with it in account can claim the proper credit for its return as not good. In London a check can only be detained until 5 o'clock P. M. of the day of presentation, but in this country it was decided (*Overman v. Hoboken City Bank*, 31 N. I. L. R. [2 Vroom], 563,) that 24 hours was not unreasonable delay. The check in this case was presented between 12 and 1 o'clock of one day, and returned as not good the next day about noon. Basley, C. J. decided that the bank was not liable for the check by reason of this long retention, and had a right to retain it thus for re-examination of the drawer's account.

19. A makes a deposit at his bank, consisting of checks on different institutions, and receives credit for the same in his pass-book. Can he draw out part or all of the sum thus credited to him the same day, or can the bank legally refuse him the money?

A. It is the custom for banks to cash checks drawn against such deposits, but if they have any doubt of the value of the deposit they would be justified in limiting the drawer until the deposited checks had been cashed. The checks credited as cash in the pass-book, if not paid, are charged back to the depositor; and there is no legal obligation on the part of the bank to cash a check drawn against them, although as a courtesy to the depositor this usage is almost universal.

20. A gives B a check in payment of a legitimate debt. Shortly afterward, and before B can present the check at the bank, A stops payment of it. In due course B presents it and is refused payment, although there are sufficient funds to meet it. Does the notification of A relieve the bank of all responsibility, and can the bank subsequently pay out all of A's balance and leave B's check unsatisfied?

A. In this State (N. Y.) such a notice from the drawer is sufficient to justify the bank in refusing to pay if the countermand has been received before the check has been presented or the bank has notice of it. In plain words, the drawer of the check has countermanded the order on the bank, and this is sufficient as between these two parties. A court in a Western State a little while since held that a bank could not go on paying out the funds of the depositor, and was liable to the holder of the check, but we do not think that it is good law. It would not be accepted in this State (N. Y.), where a different principle has prevailed.

21. (1.) What is the correct thing for a paying teller to do when a note is presented for payment, for which the funds are ready and which is otherwise good, but past due? Should he pay it, send it back, or refer the holder to the drawer?

(2.) In case, under the above circumstances and for the above reason, a note is sent back unpaid, can it be legally protested? And if protested is the drawer entitled to damages for injury to his credit suffered by the protest, or to any other satisfaction? And if so, should he look for it to his own bank, or to the holder of the note?

A. (1.) If the note was some time past due, even if payable at the bank, the teller should be put upon inquiry as to the cause of the delay, and if this was not satisfactory should delay payment, and by mutual consent, if possible, refer the matter to the maker.

(2.) The note should not be protested in such a case, as there would be no object whatever in doing it. All the indorsers are discharged by the delay (unless there is a legal excuse for it) and the maker is as much held without a protest as with it. The note being past due and non-negotiable, and no protest therefore required, the fees for the protest could not be recovered of any of the parties. *German v. Ritchie*, 9 Kans., 110; *Noyes v. White*, id. 630. *Daniel on Neg. Ins.*, vol. ii, page 9.

22. Has there ever been a case where a bank has refused the payment of a check that it had certified? If so, when, and what bank did it?

A. A city bank, whose teller certified to a note made payable at its counter, refused to cash it on the ground that its teller made a mistake in such certification, the man's account not being good for the amount as he supposed, and its position was sustained by the courts.

23. A owes B and gives him his check on City Bank. B keeps his account in the City Bank also, and deposits A's check, which the teller enters to his credit on his pass-book. On the following day the bank returns A's check to B, stating that A's account is not good for the amount of the check. We would like to know if the bank is not liable to B for failure to protest or notify B on day deposited.

A. The old rule of law was that a bank which receives a check on itself and places it to the credit of the depositor has virtually certified to it and cannot return it and erase the credit. This was based on the theory that the cashier, who in old times received and paid out all the funds, was the proper person to know if the check was good, and if he took it and placed it to the credit of a depositor the bank was held for it. But the custom of banking has changed. The cashier does not handle the funds directly; there is one teller to receive and another to pay. If a depositor wishes to hold the bank he should take it to the paying teller and have it certified before he gives it to the receiving teller for deposit. In these changed conditions the courts are coming to the view that the bank may return a check on itself, received from a depositor, if not found to be good, precisely as it may return a check on any other institution, and this may be done on the following day. In this State (N. Y.) the

old law has not been changed by any modern decision, and a judge in California, quoting the New York decision, reaffirmed it. On the other hand, a judge in Pennsylvania, before whom an article on this subject from our pen was read in open court, decided that the bank was not held and might return the check.

24. Checks are sent in from other banks after banking hours and credits given in lump, after which they are passed upon by book-keepers, and those found to be not good returned, usually the same afternoon. Can a bank legally refuse to give credit for checks so returned?

A. The first credit is not absolute, but is contingent on the examination, precisely as a depositor is credited in his book with his daily deposit, and can be charged back with all checks or even bank notes, that upon examination or collection prove not to be good.

COLLECTION.

25. A makes a check payable to bearer and pays it to B, B holds the check some sixteen days and pays it to C, C the next day takes it to a bank in another town and gets the money on it, paying the customary fee for collecting, but does not indorse it. The bank the same day sends it for collection to the bank on which it was drawn. A draft is returned without delay on its city correspondent, and is sent forward the same day and is presented for payment, which is refused and the draft is protested, the bank issuing the draft failing that day. Which of the parties bears the loss?

A. The bank from which C drew his money must stand in the gap. When it accepted anything but cash for the check, it did so at its own risk, and if it had received the check from the maker only the day before it could not go back on him for the money.

26. I cut the following memorandum from the margin of a letter of a Chicago bank:

"This bank in receiving collections, acts only as your agent, and does not assume any responsibility beyond due diligence on its part, the same as on its own part."

Suppose A deposits draft in bank here on B at Smithville. Bank here sends draft to Smithville bank for collection. B pays draft and Smithville bank remits draft on New York. Draft returns from New York, "No funds." If bank here used "due diligence" in selecting Smithville bank as agent does A have to stand the loss if any results? Does it make any difference whether A made sight draft or on time, and bank has discounted it and A has had the proceeds?

A. The bank receiving the draft on deposit, whether it was on sight or on time, will have to pay the depositor in full and use "due diligence" to save what it can by collecting it out of the defaulters.

27. A draft was presented at our office to-day at 3.30 P.M. by a bank runner. Our cashier paid it, but contends that had he refused to do so the bank could not legally protest it and collect the same. I maintain that if presented within reasonable business hours and payment refused, it can be protested and fees of same collected.

A. A draft on a bank must be presented in banking hours. A draft on a business house is to be presented during business hours. This is the greatest trouble in our city. Banking hours are fixed by common consent from 10 to 3 o'clock. Business hours have no "fixedness," and bank runners take checks to collect at all hours up to 6 P.M. In the summer season, when so many principals leave their offices at an early hour in the afternoon, this habit is exceedingly inconvenient, and often quite embarrassing. Drafts presenting at 4½, 5, 5½, and even as late 6 o'clock, sometimes even after the youngest clerks have gone home, and no one but a porter is in charge, and a protest is noted, the fee for which is to be collected in the morning. There is hardly a day in the summer season when some dispute on this point is not referred to us for settlement. We have often suggested that the whole difficulty be settled by legislation. The better way would be to limit by law the time for presenting at business houses drafts, &c., for acceptance and collection to a given hour, say to one hour later than the usual limit of banking hours. At present there is no limit, and if the case is taken into the courts, then the day of the week (Saturday being an exception usually), the period of the year, the custom of the particular trade, and various other points would be required in evidence to decide whether the hour of presentation was really within "reasonable" business hours or not. As the average juryman knows little on this theme, no one could predict the verdict.

28. A B, a customer residing in Reading, Pa., sent me a check post dated December 10; at the time of its maturity A B requested me not to present the same till January 1. Accordingly I deposited it in my bank December 31, when the amount of check was entered in my book

as cash. January 14 I received notice of protest. On inquiry at the bank for reason of this delay, we received the reply that the bank is in the habit of sending its collections for Reading, Pa., to Pittsburgh, Pa. Now has the bank a right to attend to the collection of a check in such a roundabout way? Can I hold the bank responsible for the loss incurred through their way of doing business?

A. If our correspondent can show that the bank did not use due diligence in collecting his check, and that in consequence of such neglect the check was not honored, he can hold the institution responsible. But neither of these are proved in the above narrative. The bank followed its usual routine of collections, and there is nothing to show that the check would have been paid if it had been presented a few days earlier. The check is still valid against the drawer, unless the bank on which it was drawn failed during the period of the delay, the account of the drawer being good all the time. It appears to us that A B, and not the collecting bank, is the party to be censured. If the check was good January 5th, it ought to have been good three or four days thereafter

DEPOSIT AND DEPOSITORS.

29. A B & Co have made an assignment. Included in their liabilities are loans from a bank on the firm's notes with usual indorsement. These notes are not yet due, but the bank immediately on announcement of assignee's appointment took possession of A B & Co.'s balance, refusing payment of all checks made against it, and which were drawn before assignment was made. The bank gives for its reason for this action its intention to hold the balance toward payment of notes when due.

1. Must not a bank wait until such notes become due before taking action, and even then only by due process of law in the same manner as any other creditor?

2. Cannot the holder of check under such circumstances sue and recover together with damages for such detention?

A. We think that the bank will be legally justified in its action.

30. Are depositors in national banks allowed or entitled to interest when deposits are left untouched for a longer time than a day or a week, say for three months or more? Is a depositor entitled to interest?

A. The depositor is not entitled to interest on the deposit, no matter how long it is left. The bank must keep a considerable portion of the depositor's balance on hand to be ready for any

call upon it; and it is entitled to the use of such part as it may safely loan out again, as a recompense for transacting the business for the depositor.

31. If I telegraph to a bank "Is check of A B good for one hundred dollars?" and the bank replies "Yes," does this reply make the bank responsible for the payment of the check?

A. It is a dangerous thing for a bank to make such a reply, unless it is very sure the account will be kept good until the check is presented, as it cannot charge the sum specified to the depositor and may have trouble with the holder, if the money is drawn out before it is demanded by him. We feel confident that a bank would not be held in this State (N. Y.), if the depositor should not have sufficient to his credit to meet a particular check, provided at the time the inquiry was made the account was good as represented. But the answer should be qualified in all cases so as to avoid any seeming certification of a particular check to be thereafter presented.

32. A check on a Savannah bank payable to the order of one of our depositors in the interior of the State (N. Y.), was sent to us by him for his credit, without his endorsement. I indorsed for him, guarantying his signature thus: "John Doe," indorsement guaranteed "L. P. Jones, cashier," and forwarded it to our bank in Savannah for collection and credit. It was presented for payment and refused, the cashier contending that it must bear the genuine signature of the payee, and that my guaranty would only hold me individually, and would not hold the bank I represent. Was he right as to the last point?

A. The indorsement of L. P. Jones, cashier, the bank collecting the money, or having the same placed to its credit, guaranties on the part of the bank the genuineness or sufficiency of the person's indorsement, even without the words prefixed to the signature.

33. A deposit being made in bank of cash and country checks, and the amount entered as a credit in the depositor's book, should not the bank notify the depositor without delay, if it concluded not to credit in its books the full amount as shown by deposit book? Were they to neglect so to notify depositor and damages occur, would the bank be liable or not?

A. The bank, after further examination, might conclude to

hold the checks, in whole or in part, for collection, instead of giving the depositor credit for them as cash. It ought, most certainly, to notify the depositor of this change if he is likely to draw against the deposit; but if it fails to do so, we do not think the bank can be held in damages.

34. V.A.—A owes a certain bank a note of \$500 and he holds a certificate of deposit of that bank for a like amount. The bank goes into the hands of a receiver, and its assets are only sufficient to pay 50 cents on the dollar. Can A be made to pay the full amount of his note and receive only 50 per cent. of his claim against the bank? or is the certificate an offset to the note?

A. The Virginia courts not having decided this question, they may, if they so determine, establish a rule of their own, under the State statutes; but the weight of authority, elsewhere, is in favor of allowing such a set-off, provided the depositor's debt to the bank was contracted prior to the assignment, and was not due on a subscription to capital stock. In the two specified exceptions, the rule is the other way. *Waterman on Set-off*, 24; *Bank v. Sherlock*, Pennsylvania Supreme Court, June 22, 1877; *Platt v. Bentley*, *Thompson's Bank Cases*, 758, &c.

DIRECTORS AND STOCKHOLDERS.

35. Under the national banking law, a director of a national bank is an officer of the bank in the eye of the law, and could not therefore vote a proxy for a stockholder?

A. The directors of a bank are not "officers" in the application of the law. In section 5,136 this is plainly shown. The association is there given power to elect or appoint directors, and by its board to appoint the officers; and to adopt by-laws to regulate "the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred," &c., all of which shows that directors are not classed as officers.

36. At an election for directors of a national bank can a director who is a shareholder vote a proxy, and is he considered an officer of the bank?

A. A director is not included among those who cannot act as proxies at an election. The law provides that "no officer, clerk, teller, or bookkeeper of such association shall act as proxy." The law throughout distinguishes between the directors as such

and the officers as such ; in sec. 15 (5136) it authorizes the " board of directors to appoint a president, vice-president, cashier, and other officers." In another paragraph it authorizes the board of directors to prescribe how " its directors shall be elected or appointed and its officers appointed," and in other provisions settles this question beyond a doubt. A director may therefore act as proxy for a stockholder.

37. Will you please explain the duty, responsibility, and privileges a director has in a national bank ? I want to do my duty as far as I can, and I know of no person who can define it half as well as you can. Your reply will instruct many hundreds who are directors, simply allowing their name to be used, but giving no time or attention to the workings of the bank.

A. We have not space to enumerate the duties, responsibilities, and privileges of a director in a national bank, which we suppose to be the position referred to in the inquiry.

He is required to be a citizen of the United States, to own ten shares of the stock, to see that the bank has been duly organized, that the reserve is properly maintained, that the business carried on is legitimate, that no dividend is declared out of anything but profits, that no loan is made on the security of the stock, that no loan is made on a deposit or pledge of United States notes, that no check is certified without the drawer has the amount to his credit, that the funds of the institution are not wasted by fraud of any of the officers or clerks, that the reports of its condition are duly made to the Comptroller of the Currency, and to see that no loan to any one concern exceeds ten per cent. of the bank's paid up capital. The directors must take an oath to execute the provisions of the law, and if they knowingly violate, or permit any officer or servant of theirs to violate any of these provisions, they are personally liable for all the resultant damage.

38. Will you quote the law relating to the liability of stockholders of a State bank toward depositors ?

A. The original State free banking act provided against individual liability of stockholders except where it was recognized in the articles of incorporation. The new Constitution, however, in article viii, sec. 7, enacted that the stockholders in all

banking associations issuing bank notes or any kind of paper credits to circulate as money "after the 1st of January, 1850, shall be individually responsible to the amount of their respective shares," for all its debts and liabilities contracted after that date. It was decided that this liability was pro rata, so that each stockholder was only chargeable with his share of the deficit up to the amount of his stock, and not for the deficiency of other stockholders from whom nothing could be collected. After the national system was adopted the State bank issues were taxed out of existence, and as they issue no "bank notes or any kind of paper credits to circulate as money," it is doubtful if their stockholders are liable unless the articles of association so provide.

39. Are stockholders in "National" banks personally liable? If so, is there not an exception when capital stock of the bank is a certain amount, say three or five million of dollars?

A. The stockholders of a national bank, as a rule, are individually liable to an amount equal to their stock, not for each other, but each for himself, ratably for any deficiency to meet the debts of the bank. The exception is in favor of the shareholders of any bank with a capital not less than five million and a surplus of 20 per cent., the latter to be maintained. This was inserted to cover the case of the Bank of Commerce, whose charter exempted the stockholders from all personal liability, so that it could not change from a State to a National bank without increasing the risk of its shareholders, and this was adopted to meet that emergency.

40. A sells to B national bank stock and delivers certificate with power of attorney attached, which B holds and does not transfer the stock out of A's name. Nearly five years after the bank make an assessment and claim it of A. Is he liable?

A. Where it is provided by the by-laws of a national banking association, under authority of the Banking act, that "the stock of this bank shall be assignable only on the books of this bank," the decision of the New York Court of Appeals in *Johnson v. Underhill*, 52 N. Y., 203, justifies the conclusion that in New York, at all events, A would be held primarily liable to the

assessment in the case above stated. *Johnson v. Underhill*, it is true, was a case coming under the joint-stock incorporation law of New York, but the decision turned upon a provision of that law identical in effect with the by-law above quoted. The Court held that the vendor's personal liability continued as long as the stock remained in his name; but at the same time it was decided that whatever amount he should be compelled to pay under these circumstances could be recovered by him from his vendee. The National Banking act itself declares that "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." Where no such by-law as we have quoted exists, no doubt the transferee would be liable in the first instance, under this clause.

41. Is a stockholder in a banking or industrial corporation personally and individually responsible for all the liabilities of a company that has become involved?

A. Most of the joint stock companies in this State are formed under a law which protects the stockholders, if the law is complied with, from all further individual liability. As to the banks, a few by charter and national law, are protected from all personal liability; but in most of our banks the stockholder is liable for his share of any deficit to the extent of his stock. That is, if a bank of \$100,000 capital becomes involved, and owes \$100,000 above its assets, a man who owns \$1,000 of its stock would lose his investment and have to pay in to the creditors \$1,000 more. But if half of the stockholders could not respond to such an assessment, the solvent among the list need not contribute for that delinquency. If the loss calls for an assessment of half, or any other portion of the par value of the stock, each stockholder can be called upon only for his own share, and the creditors will lose the amounts assessed against the stockholders who cannot respond.

42. Would not a director who had thus withdrawn and received payment out of the funds of the bank be bound to return the amount received with interest, and be liable in case of failure or loss of the bank, and would he not be liable to breach of trust as director?

A. No one, whether a common shareholder or director, would be liable if the bank should subsequently fail, except for an amount equal to the stock he held in the reduced capital, provided the payment to him was not in excess of the sum actually due, and was not itself an infringement of the actual capital as stated after the payment.

43. Why are national banks prohibited from lending on their shares of stock? Why is it inexpedient to lend on its shares of stock?

A. A bank might be started with \$100,000, all lent out again to the stockholders on a pledge of the certificates, and thus there would not be a dollar of capital or security for the depositors, if the banks were not prohibited from lending on their own stock.

44. In the case of the assets of a national bank being deemed inadequate to meet its liabilities, and the stock having materially fallen in value, say 25 per cent., what recourse has a stockholder to protect himself against further depreciation? I understand of course that the billholders are protected from loss, but has the Government any right to intervene for the protection of stockholders when it is apparent that the capital of a bank has become impaired by losses? If so, on whose application is this done?

A. An application to the Department at Washington on behalf of the stockholders will lead to an examination of any such bank, and if its stockholders require any active protection, to the institution of the proceedings necessary to such a result.

45. Can a national bank, under the National Bank law, refuse to transfer its stock when a certificate is presented properly indorsed by a responsible party, assigning as a reason that the party in whose name the stock stands is a debtor to the bank? Has such a bank the right, under the law, when issuing a certificate of stock, to write or stamp on the face of it words to the effect "that the bank will not transfer the stock while any liability exists against the party in whose name the stock stands," although none exists at the time the stock is issued?

A. The United States Circuit Court, District of Indiana, in *Evansville Bank v. Metropolitan Bank*, held that a by-law of the bank that no transfer of stock should be made without the consent of the board of directors by any stockholder who was indebted to the bank, is in violation of the 35th section of the National Bank act, and not binding. (10 Am. Law Reg. N. S. 774.) The above decision rests upon the authority of the United

States Supreme Court in the case of *Bank v. Lanier*, 11 Wallace, 369. Here the plea was that the bank was organized, and its by-law forbidding transfer of stock while indebted, etc., adopted under the 36th section of the act of 1863, but the court rejected the contention, saying: "Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them." The clause in question, therefore, stamped on the certificate, is of no validity.

46. Can a director who is under protest in the bank as indorser vote his stock at an election for directors of said bank?

A. The law provides that "no shareholder whose liability is past due and unpaid shall be allowed to vote." If a director is liable as an indorser of a past due and unpaid obligation, he cannot legally vote on his own stock, although he might vote as the proxy of another.

MISCELLANEOUS.

47. Will you give me some authorities on the question of usury as applicable under national bank charter, especially as to pleas in usury and the action for penalties as prescribed by the charter?

A. The following are all the cases we have on our record, which we think will be of interest:

The penalty for usury under the National Bank act is not recoverable by an action in the courts of New York.—*Hintermeister v. First National Bank* (1875), 5 Thomp. & C., 484; 3 Hun., 345. *Reversed*, by Court of Appeals, 18 Alb. Law Jour., 163.

The United States Statutes of 1864, ch. 106, sec. 30, limiting the forfeiture for usurious charges by national banks to the interest, applies to banks in all the States, and supersedes the State laws on that subject.—*Central National Bank v. Pratt*, 115 Mass., 539. This exercise of power by Congress is constitutional. Same case, approving 22 Ohio St., 492, and disapproving 50 New York, 95.

National banks may take the rate of interest limited by the

State law, without incurring the penalty of usury.—*Tiffany v. National Bank of Missouri*, 18 Wall. (U. S. Supreme Court), 409; *Wiley v. Starbuck*, 44 Ind., 298.

A contract made by a national bank in New York at a higher rate of interest is void.—*First National Bank v. Lamb*, 50 New York, 95; 57 Barb., 429. Reversed by U. S. Supreme Court in *Farmers and Mechanics' National Bank v. Pearing*, 12 Alb. Law Jour., 310.

The penal consequence of making a usurious loan by a national bank is forfeiture of twice the amount of illegal interest, under section 30 of the National Bank act of June 3, 1864. The principal debt is not forfeited. Nor does the mere fact that such a loan is prohibited by statute, without any words declaring the contract void, preclude the bank from recovering back the amount loaned.—*Bank v. Moore*, 2 Bond, 170.

In an action by a national bank against the indorser of a note, he cannot plead usury, the right of action for the usury being in the drawee.—*Bly v. Second National Bank of Titusville*, 14 Alb. Law Jour., 298.

In an action to recover the principal of a usurious debt, more than two years after the payment of the usurious interest, the debtor cannot set off the amount of such usurious payment against principal.—*Higley v. The First National Bank of Beverly (Ohio)*, 13 Alb. Law Jour., 388. Before judgment, the penalty for taking usurious interest by a national bank does not bear interest.—*Ibid.*

Plaintiff can recover twice the amount of interest paid *in excess of the legal rate*.—*Hintermeister v. First National Bank, etc.*, 13 Law Jour., 163.

48. A B deposited in a national bank \$100, for which said bank, in compliance with his request, issued its certificate of deposit, which reads as follows :

— NATIONAL BANK, March 30, 1878.

This day C D has deposited in this bank \$100, which sum will be paid him, or order, upon the surrender of this certificate. Signed, E. F. G., Cashier.

Anterior to this, judgment had been obtained against A B, and the judgment creditors had the proper garnishment served on the bank on the 10th day of April, 1878, to answer. On the 18th of April, before the bank answered the suggestions, A B went to the bank and de-

manded the money for his certificate. The bank refused to pay on account of said garnishment. On the subsequent day A B appeared at the counter of another banking house and requested the banker to give him the money on the certificate. Knowing nothing of the former proceedings in the case, the certificate was cashed at its full face value. The next day the certificate was presented to the national bank for payment, which was refused for the reason given above. The case came up in court on the garnishment, and the national bank answered that there was nothing at the credit of A B, but the amount was to the credit of certificate account, and that a third party claimed the money as holder of the certificate. The case was fully argued for judgment creditors and the bank. The court decided that judgment creditors of A B were entitled to the money, and not the banker who cashed the certificate. Will you be kind enough to give me your opinion as to who is legally entitled to the money? If there have been any judicial opinions in similar cases please refer to them.

A. The above certificate of deposit, being negotiable in form, we think could no doubt have been transferred to the banking house which actually cashed it, in such a manner that the deposit would not have been subject to the demands of A B's creditors. What appears to us to be the fatal defect of A B's case, however, is this: After he had demanded the deposit and it was refused him, the certificate became an over-due obligation, subject to whatever equities might exist between A B and his creditors. Authority for this point is scarcely needed, but it may be found in Daniels on Negotiable Instruments, ii, 604; and *Coye v. Palmer*, 16 Cal., 158. An equity in favor of A B's creditors had attached to the certificate before it was transferred, and when transferred it was an over-due instrument. We therefore think the decision sound.

49. In February last R procured from a New York bank a certificate of deposit for \$100 payable to the order of H, and deposited it in a United States Mail Letter Box, sealed in envelope and directed to H, who resides out of town. H has never received it, and its payment has never been demanded by others though nearly three months have elapsed. H having never endorsed the certificate, no one can obtain the money unless by forging his name, and hence the bank cannot rightfully pay or be compelled to pay the amount to any other person. The bank officers know H to be a responsible man. H consents to give the bank his receipt in full for the certificate on receiving its amount, but objects to giving security. Has the bank any legal or moral right to demand of H, as a condition to paying him this money, that he shall give a bond of indemnity or any security against the

future presentment of this certificate by some other person? The case seems different from that of the usual check, which the bank has not obligated itself to pay.

A. The payee has no right to insist that the bank shall pay with nothing but his word between it and a second payment. If the certificate is found H can endorse it and pass it, and the new holder can compel the bank to make it good. H promises that he will not do this; his character makes it probable that he will keep his promise; but the bank is entitled to a bond besides.

50. In the year 1863 the Union Bank of — obtained a judgment against one of our customers, which never having been paid, remains on record. Subsequently the bank changed its title and charter from a State to a national bank, and is now known as "The Union National Bank" of —. Now, can the latter institution revive this judgment, there being nothing on record to show that this claim was ever assigned to the national from the State bank, or, can the judgment be revived at all, there being no longer any such bank acting under a State charter?

A. In this State the transfer of title to property from a State to a national bank, the latter succeeding the former, need not be made by assignment, as it is done by statute in the enabling act thus: "All the assets, real and personal, of the said bank, shall immediately by act of law, and without any conveyance or transfer, be vested in and become the property of the national banking association into which said bank shall have been converted." The national bank thus owns the judgment belonging to the State bank, and may revive it precisely as the other could if no change had been made.

51. Can you tell me the laws of the State of Ohio in regard to foreign banking capital? perhaps you might quote the statute.

A. Every company, association, or person, not incorporated under the laws of Ohio, or of the United States, who shall have a place of business in that State, and engage in lending money, receiving deposits, buying and selling bullion, bills of exchange, notes, bonds, stocks, etc., is declared to be bankers, and they are required to make annual return under oath of the (1) amount of bills receivable purchased or discounted, and considered collectible; (2) the average amount of accounts receivable; (3) the average amount of cash; (4) average amount of stocks,

bonds, &c., in any way representing assets; (5) average amount of real estate at assessed value; (6) average amount of all deposits; (7) average amount of accounts payable, exclusive of current deposit accounts; (8) amount of capital paid in or employed. From the aggregate sum of the first five items the auditor is required to deduct the aggregate sum of the fifth (so the law reads, though it seems to conflict with the previous clause), sixth, and seventh items, and the remainder thus obtained is subject to taxation the same as other personal property in the same city, ward, or township. (Ohio Revised Statutes, 1880, sections 2,758, 2,759.)

52. A national bank advertises the following business :

"Bills of exchange and letters of credit on Europe, remittances through the mails to Europe, collections of claims, inheritances, etc., in Europe, certificates of passage to and from Europe."

The question arises, can a national bank transact such business under its charter? And if not, does it thereby forfeit its charter? Who is responsible to its customers in such transactions? If a loss should result out of such transactions cannot the stockholders throw it off upon the officers of the bank?

A. Unless the bank can legally engage in the business described, its officers cannot bind the corporation to any contract, or fix upon it any liabilities in connection therewith. For, "One principle will always hold, viz.: that whatever is beyond the power of the corporation is, *a fortiori*, beyond that of the directors, and therefore in considering the legal effect of any proceeding done, entered upon or ratified by them, we must first consider whether such proceeding could have been done, entered upon or ratified by the corporation itself."—*Green's Brice's Ultra Vires*, 411. The collection of every kind of business paper is regarded by the courts as a part of the banking business.—(Morse on Banks and Banking, 322.) But "a banking corporation can engage in no business transaction which is not, properly speaking, of a banking nature."—*Id.*, 5. The issue of passage tickets to Europe is clearly not of this nature. The collection of inheritances is more in doubt, but the business might be conducted in such a way as to constitute legitimate banking. As to the forfeiture of the charter in such a case, the act, if legal,

might work a forfeiture if the Government chose to institute proceedings to that end, but in a doubtful or immaterial case, the court would not be likely to declare a forfeiture. And if any liability is incurred by reason of an act not within the power of the bank to perform, "the individuals who take part in the pretended corporate act are responsible."—(Grant on Corp., 281.)

53. Will you kindly state if a banker and his firm (if such embraces others besides him) are liable for the sale of bonds which they declared perfectly good, and which are bought through faith in such statement, if payment of the very first interest due after the purchase is in default and all following payments are disregarded?

A. Any one who sells a worthless bond, representing it to be good when he knew it to be bad, can be indicted for obtaining money under false pretenses; but he is not liable if he has acted in good faith even though the interest is never met. No man is obliged to be infallible in his judgment. We have no doubt that bonds are sold as good when the sellers have reason to know that the investment is a bad one; but it is difficult to obtain such proof of this guilty knowledge as will bring the culprits within the law.

54. A New York banking-house issues its circular letter of credit for \$1,000 to a man going West. This letter requests any one making payments on it to indorse the same on its back. The holder takes his letter to a western banker, and draws \$500 on it. The banker making the payment fails to record it on the back of the letter. The man then presents the letter to another banker in another place, and draws a draft for \$1,000, the full amount of his credit. This draft is cashed, and is forwarded together with the letter to New York for collection. In the mean time, however, the first draft has been presented and paid, and when the second is presented it is refused, as there is only \$500 remaining in the hands of the banker to the credit of the letter against which it is drawn. Now, who loses that \$500, the man to whom the letter was issued having absconded?

A. The New York banking-house must pay that one thousand dollars, and can recover the five hundred of the agent who drew the first draft and failed to make the indorsement. The loss of this modest sum may teach him a lesson worth the money. The holder of the thousand dollar draft and the letter authorizing it can collect the same of the New York banker, with damages for non-acceptance, and interest from the day of demand.

55. D & Co. are Western bankers keeping an account with a Chicago bank, and frequently telegraph for money for various purposes. It is known to the Chicago bank that one of the partners is away on a short trip. They receive a forged telegram from D & Co. to send \$100 by mail to Henry Jones, care of — Hotel, St. Louis. As Mr. Jones is a swindler, who loses the money, D & Co., Chicago bank, or telegraph company?

A. We suppose that our correspondent means to say that the bank received a telegram purporting to come from D & Co., which proved to be a forgery. This being true, the bank loses the money unless it can catch the rogue. The telegraph company is not responsible unless it guarantees the signature. This it is always ready to do for a consideration. Had this been required the fraud would have been detected.

56. 1. If A, who is cashier of the National Bank at C—, discounts a draft payable at D—, and indorses the draft "Pay to D— or order for acc't of Nat. B'k C—, A—, cashier," is A liable individually, or does his indorsement bind the bank only?

2. If the bank only is liable upon the above indorsement, suppose A should indorse the said draft as cashier, omitting the name of his bank, would parole evidence be admissible to supply the name of such bank, and thereby fix it with liability?

3. Suppose the bank C— should fail after A, cashier's endorsement, could A be held individually liable if draft was returned protested?

A. 1. There can be no question where a bank officer is authorized to indorse for the bank, and as in this case gives the name of his bank as well as his own, the bank alone is bound and he incurs no individual responsibility. Chitty on Bills, ch. 2, pp. 37, 38; Story on Agency, sec. 153 and note 275; Wilks v. Bach, 2 East., 142, and a host of other authorities.

2. Where the name of the principal was omitted it was once held that the agent was personally liable, but this rule has been modified until the following is the principle generally accepted: "If it can, upon the whole instrument, be collected, that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Story on Prom. Notes, sec. 69; Pentz v. Stanton, 10 Wend., 271; Mec. Bk. Alexandria v. Bk. of Columbia, 5 Wheat., 326, and many others.

3. The failure will not affect the question. It is admitted

that the signature of a bank officer as such, with his official title attached, made in the regular course of business, in a manner usual and customary, and for which he is duly authorized, binds only the bank in any event. Only in cases where he signs wholly without authority is he held personally liable, and here, although the question is disputed, the authorities are inclined to hold that he is not liable on the instrument itself as indorser, but in a separate action. The "indorsement by the cashier of a bank, 'A B, cashier,' is sufficient to pass title of the bank, unless he is prohibited by the by-laws of the corporation." Story on Prom. Notes, sec., 137; Fleckner v. Bank of the U. S., 8 Wheat., 360, 361; Wild v. Passamaquoddy Bank, 3 Mason, 505.

57. A borrows money of a national bank in New York city; his obligation is dated 1st instant, and is payable on demand. He returns the amount loaned to him at 3 p. m. on the 3d of the same month. How many days' interest does he owe the bank?

A. It is the custom of the banks to charge for three days in such a case, but by law no more than two days' interest could be collected.

58. Is a national bank in the State of New York allowed to charge 7 per cent. interest?

A. It is illegal for any bank in this State (N. Y.) to charge more than 6 per cent. for the loan or forbearance of money, but the penalty provided by law for such overcharge in the case of banks is very mild, being a forfeiture of the interest if not yet paid, or a liability to be sued within two years for twice the amount if it has been collected.

59. A borrows \$500 from a national bank and renews it from time to time, paying each renewal illegal interest and part of principal until principal is reduced to \$200. Can A before he pays the balance due (\$200) recover penalty by suit *qui tam*.

A. An action would lie at any time within two years to recover the excess of interest paid, no matter what might be the case as to maturity or the payment of the note itself. The National Bank act declares, in the original, section 80, that the action is in the nature of debt; and if our correspondent's

inquiry is aimed at that point, we should be inclined to say that though this alone does not preclude the action *qui tam*, yet the fact that the penalty is given entire to the person paying the illegal interest, or his legal representatives, seems to render that form of action unsuitable.

60. In making returns to collector of internal revenue of amount of United States bonds to be deducted from taxable capital, some banks have estimated them at their present market value, others at purchase value, and still others at par value.

Will you kindly inform us if there has been a recent decision of the Attorney-General or United States Supreme Court authorizing or legalizing either of the first two methods, and if so, please quote the decision?

In that case can banks which have deducted bonds at par value recover excess of taxes previously paid?

A. The opinion of the Attorney-General, dated October 21, and published in the *Journal of Commerce*, October 24, 1878, was to the effect that in reckoning the value of United States bonds for the purpose of deducting such amount from taxable bank capital, the price paid, not including accrued interest, should be taken.

The United States Treasurer, in a letter to the Merchants' National Bank of Baltimore, transmitting the opinion, states that no claim for refund of taxes would be entertained.

61. When a national bank reduces its capital must the whole number of shares be reduced pro rata, each shareholder receiving a reduced number of shares? Or would it be lawful to allow certain shareholders to withdraw, the bank paying them a certain sum of its assets, thereby relieving such shareholders from any liability that might fall on them in case of the bank failing? Or would not such shareholder be bound to return the amount received from the bank for the benefit of all shareholders, and assume his liability with other shareholders?

A. Any plan of reduction to which the shareholders assent, which leaves the capital of the bank at the sum nominally represented, if it meets the approval of the Comptroller of the Currency as provided for in section 5,143 R. S., and is not below the legal limit, is lawful and proper.

62. A pays to a national bank in a western city a sum of money for them to place to credit of B, in New York, by telegraph. The bank telegraphs its correspondents in New York to pay B, who, upon

asking for the money, is informed that the bank will not pay on a telegram, as it might be fraudulent. In the meantime B receives draft, draws check on bank having this money (or at least telegraphic notice), and the bank allows it to go to protest. Has B any redress?

A. The New York bank has not brought itself under any obligation to B, and hence the latter has no claim upon it. A at the West pays his money to C-bank, the latter agreeing that D-bank in New York shall repay the money to B. If D-bank will not do it on the receipt of the telegram, no one has any claim on D-bank for the resulting damage, unless it has contracted or bound itself to pay on such notice. B may fall back on A, if the latter has agreed to pay certain funds on a given day in New York, and has failed in his arrangements. A can then collect his damages of C-bank, the latter having undertaken a service it failed to perform. The C-bank can then recover of the D-bank, if the latter had agreed to obey its orders by telegraph, and then refused to acknowledge it. But the probability is that the C-bank will have to stand in the gap, as it appears to have undertaken a task for which it had made no provision, and which it therefore failed to execute.

63. A person holds a certificate of deposit payable to his order, which he indorses to another, but afterward calls at the bank and requests that payment be refused. Ought the bank to refuse payment? Is there a difference between this and the person's check drawn to his own order and indorsed? Could he stop payment of his check? Would it make any difference whether the certificate or check was indorsed in blank or to the person presenting it?

A. A certificate of deposit stands on a footing totally different from that of a check. The latter is an order of the drawer to pay the holder or payee so much money. If this is countermanded there is no such obligation on the bank to pay it: it has no order. But a certificate of deposit is a promise or undertaking on the part of the bank to pay on the return of the certificate properly indorsed, and the bank refuses at its own risk when due demand is made. If the original holder has lost the certificate, or claims to have been defrauded of it, the bank will sometimes refuse payment to the presenter for the sake of helping the loser to recover. But it is liable for damages if it thus refuses a bona fide holder for value.

64. A national bank was recently sued in trover in our State courts. The question has arisen among our lawyers as to whether the national bank can have the case removed to the Federal courts.

A. If the suit involved, as it probably would, the construction of "any law providing for national banking associations," the bank would have the right to transfer the same to the United States Circuit Court for that district. Rev. Stat., sec. 629, paragraph 10.

65. We hold some coupon bonds of a western city, on the back of which is the following indorsement: "For value received the National Bank of Blank hereby guaranties the payment of this bond. (Signed) JOHN SMITH, *Cashier*." The same indorsement was made upon the back of the coupons, but has been mostly cut off in cutting the coupons. State whether or not the indorsement will hold the bank for the payment of both the principal and interest, or if not, whether or not it will hold the cashier personally?

A. The only way in which a National Bank could find authority to become a guarantor of a municipal bond would be under the general clause of the bank act, giving it the powers incidental to the business of banking. If the bank had taken the bonds as collateral, and was obliged to guaranty their payment in order to realize its debt, it is possible that the guaranty might be sustained under this clause. The question, however, is a new one, so far as any adjudication is concerned, and the prima facie case is against the validity of the guaranty. Morse, in his treatise on banking, says: "It is a general rule that a bank has no power to engage as surety for another in a business in which it has no interest and from which it can derive no profit. Therefore it has no right to become an accommodation indorser." And its indorsements for value received must no doubt be incidental to the business of banking, and if the guaranty had this character the circumstances need to be shown.

The form of the guaranty is such that we think it cannot, in any event, create any personal liability on the part of the cashier.

66. Have banks, organized under the national or State law, the right to issue commercial letters of credit? Also, have they the right under their charters to obtain letters of credit from any foreign bank or bankers to or with their correspondents with bills of lading attached?

A. We see no legal objection to this business as we understand it.

67. A national bank issues its certificates of deposit in the usual form, payable on demand, stipulating that they shall bear interest at 6 per cent. if left three months. Desiring to reduce the rate of interest it issues a letter to depositors holding certificates, as follows: "Having resolved to call in all certificates of deposit which are drawing interest at 6 per cent., you will at your earliest convenience present for payment, or re-issue at 4 per cent., certificate No. —, for \$—, dated —. Notice is hereby given, and it is understood that your certificate will cease drawing interest after February 1 next."

Has a bank the power, without going into liquidation, thus to cancel its contract with its depositor? If the depositors refuse to present their certificates, will they cease to draw interest after February 1? Does the option in this case rest in the bank or the depositors?

A. Money due on demand is also payable on demand, and if tender of payment is made, that stops all interest on the same thereafter, or reduces it to a rate offered by the debtor, at his option. The bank may, therefore, by notice to the holder, stop all interest after a fixed date, or may offer a continuance at a lower rate. Both parties have the same option.

68. Mr. Jones hands to cashier of National Bank ten thousand dollars of railroad bonds with orders to send to New York for sale, and credit to his account. Owing to decline in price he instructs cashier to hold until further orders. Suddenly cashier commits forgery and other things, and on examination it is discovered that these bonds have been sold and no return made. Can the owner hold the stockholders of the bank for the amount received, or for any loss occurring through this transaction? Are the stockholders of national banks responsible for losses incurred by the cashier in transactions not directly pertinent to their business? Suppose the owner had given a car of grain to the cashier to sell for him under the same circumstances and with same result, would the bank be responsible, and is there not some limit to the acts which the officers of a national bank may do legally?

A. We do not think that the bank can be held legally responsible for such a breach of trust on the part of the cashier.

SAVINGS BANKS.

69. I have funds in a savings bank and have lost my book. The bank refuses to give me a new book or pay the money without my bond, with a satisfactory surety, to hold it harmless. I cannot give such a bondsman. Please tell me, if you can, how I am to get my money? As I cannot comply with the rule of the bank, I suppose

there must be some other way in which I can get it, and the bank be protected.

A. Most savings banks, where the depositor can be identified beyond question, will issue a new book after a reasonable advertisement of the loss of the old one. We presume the bank in question will do this. If it refuses, the courts will compel it to pay the money due.

70. Having an account in the Bowery Savings Bank in this city, I wish to say that a party got possession of my pass-books and drew from the bank the greater part of my deposit without my knowledge, and now the bank, after mature consideration, deny me the amount so drawn. Now I wish to know if I can obtain redress for my loss by putting the case in court?

My case is this: the money was drawn with the aid of the pass-book but the signature is not the same as my own.

A. One of the conditions of the deposit is that the bank is exonerated if a payment is made on presentation of the bank book. If the depositor can show that the bank did not use due diligence he might make a case against the bank, but our judgment is that he cannot recover.

71. Suppose some promissory notes are made payable at a savings bank where the payee has an account, and the bank declines to receive them on the ground that they do no commercial business, does this refusal invalidate the notes? or what is the best course to pursue?

A. The notes should not be made payable at a savings bank, but they are just as valid, only if the bank declines, the maker must provide some other method of paying them when due, or they may be protested.

72. Are savings banks restricted by law to the payment of only 5 per cent. interest on deposits, or can they declare a dividend to make a higher rate?

A. The savings banks in this State (N. Y.) are restricted to 5 per cent. regular interest or dividends. They must, however, declare an extra dividend at least once in three years, when their surplus earnings amount to 15 per cent. of their deposits.

73. (1.) Does the law fix any time in which the receiver of a broken savings bank shall close up its affairs, declare final dividend, and render account?

(2.) Is there any way by which a savings bank or its depositors can

rid themselves of a number of bankrupt trustees, who have neither the confidence of depositors nor of their fellows?

A. (1.) It would be quite impracticable to fix such a limit by law, but the receiver is subject to judicial directions in these particulars, and may be called to account if guilty of unreasonable delay.

(2.) If the bankruptcy of the trustees endangers the trust funds, there is some precedent for the exercise of the equity powers of the courts to remove them, but it appears to us rather doubtful if sufficient grounds are here stated for such a course.

74. Who elect the trustees and directors of savings banks when vacancies occur?

A. In this State under the revised statutes the savings banks are made virtually close corporations, the existing trustees having power of self perpetuation in the filling of all vacancies.

75. MASS.—What is the proper form of notice to the secretary of a savings institution, in order to withdraw an amount requiring sixty days notice?

A. A written notice that the subscriber intends to withdraw a stated amount of money is the proper form, but a verbal notice is legally sufficient.

76. What are the laws in some of the Eastern States in regard to directors or trustees and officers of savings banks being forbid to borrow money of the institutions with which they are connected?

A. The Massachusetts Savings Bank law of 1876 provides that "no member of a committee or board of investment, or officers of such corporation charged with the duty of investing its funds, shall borrow or use any portion thereof, be surety for loans to others, or in any manner, directly or indirectly, be an obligor for money borrowed of, or loaned by, the corporation." (Supplement to Gen. Stat. of Mass., 450.)

The Connecticut law provides that "no officer of a savings bank shall be a borrower, or surety for a borrower, of any of its funds, nor receive any money or valuable thing, for negotiating, procuring, or recommending any such loan from such bank, or for selling or acting in the sale of any stocks or securities to such savings bank, and any such officer, who shall violate any

provision of this section, shall forfeit to the State \$1,000," (General Statutes of Conn., Rev. of 1875, p. 292.)

The law of Maine forbids the deposits and funds of savings banks to be loaned "directly or indirectly to any one of the trustees, or any firm of which he is a member." (Maine R. S. 1871, 421.) The Rhode Island law has a simple provision of the same kind. (R. S. 1857, 292.)

BILLS OF EXCHANGE.

(SEE ALSO DRAFTS.)

1. Does the acceptor of a bill of exchange become personally liable for its payment at maturity, or can he then plead "no funds," or that the drawers have not complied with their obligations, and on proving this, escape? This question is of interest, as it appears by French law that a party once accepting a bill must pay it or go into bankruptcy; whereas by English law there are certain cases in which he is not liable. What these cases exactly are we have up to the present been unable to find out. Please state what the exceptions are, if any, by American law.

A. According to Story "by the law of England, an acceptance of a bill of exchange binds the acceptor to payment at all events." (Story on Bills of Exchange, sec. 140. 4th Ed.) So too, in this country, the same author observing, in section 164, that "by our law it is absolute and binding in every event." But, in the section first cited, he points out the existence of another rule. "By the law of Leghorn if the bill is accepted and the drawer fails, and the acceptor has not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void." By the rule that the law of the place of the contract governs its interpretation, it has once happened that the Leghorn law determined a case decided in the English courts (*Burrows v. Jemino*, 2 Strong, 733). Story's statement of the English law, however, which differs from our correspondent's conception of it, is also supported by Chitty, in his standard work on bills; and neither writer makes mention of any exception to the liability of the acceptor in any event, save in the custom of Leghorn above stated. Of course we are now speaking of a general acceptance, to which the payee is always entitled. If he permits the acceptor to make conditions, they will take the case out of the general rule.

2. Is it proper to deliver a bill of lading when a sight or time bill is accepted? If no, whose loss is it, if the goods be perishable and are injured while waiting for maturity of the bill?

A. The United States courts have recently decided that a bank through whose hands a bill of exchange, with bill of lading attached, is sent for collection, is bound to deliver the former when the latter is accepted, unless it has express instructions to the contrary.

3. A documentary (wheat) bill of exchange, drawn here on parties in England, goes to protest for non-payment. Is it obligatory on the holders of the bill to sell the cargo, or may not other friends of the drawers, without the consent of the acceptors, take up the bill and receive the documents without prejudice to or further accountability on the part of the holders?

A. Where the acceptor fails, another party, with the consent of the holder, may pay the bill for the honor of the drawer, or of any one of the indorsers, and become the custodian of the property designed for its security. He cannot intervene if the holder refuses his consent, but he need not ask permission of the insolvent acceptor.

4. If a bill of exchange is protested for non-acceptance, or a note of hand made by a party who becomes insolvent before it is due, and guaranty is refused by an indorser, can the holder, by the laws of England and the United States, obtain an attachment on the estate of the surety? And if so what is the responsibility of the party so obtaining the attachment, in case the bill or note be ultimately paid at maturity?

A. Chitty says "in this country (England) if the drawee, on presentment for acceptance, dishonor the bill, either wholly or partially, the holder may insist on *immediate payment* by the parties liable to him, as well from the drawer as from the prior endorsers; or in default thereof may immediately commence actions against each of them; and though the instrument may be somewhat like a note, yet if it also resembles a bill, and acceptance be refused, an action is immediately sustainable." (Chitty on Bills, 841.)

"The same doctrine has been repeatedly recognized in the United States." (ib, note.) This being so, the suit may be commenced by attachment, provided the other conditions of an

action by attachment exist. These are statutory, and vary more or less in all the States; but generally, we think, an attachment may be had if there is reason to apprehend that the creditor is about to remove property from the jurisdiction of the court where the action is brought. Respecting promissory notes, an attachment may be had in some of our States before the debt is due, but so far as we know, not so in England. In New York where credit was given upon condition that the debtor would make certain consignments of merchandize to the creditor as security, and after obtaining the credit be refused to ship the goods, the creditor was allowed an attachment before his debt matured. (*Ward v. Begg*, 18 Barb., 139.)

5. A, of Chicago, Ill., draws a sight draft through H & W, of Chicago, on B, of Augusta, Ga., against a cargo of flour. The draft is authorized by B, but before presentation of the draft B is notified of the death of A. Can B pay the draft legally after notification of the death of A? The flour was received and partly sold by B.

A. It will make no difference about the flour, &c. A bill of exchange differs from a check: with the latter the drawee pays at his own risk after notice of drawer's death; but a bill of exchange if delivered to the payee or his agent, is not affected by the death of the drawer, "and the drawee may accept and pay it." *Daniels on Neg. Ins.*, vol. I, page 372; *Hammonds v. Barclay*, 2 East., 227; *Chitty on Bills*, 325.

6. A, of Wilmington, sells B, of New York, 1000 barrels of tar, free on board, at a certain price. A submits the invoice and draws for the amount on B through a bank at Wilmington. Who pays the exchange?

A. This will depend on the understanding between the parties, but if nothing is said or implied about this between them, it is sufficient if B in New York cashes here the claim for the face of the bill as rendered. If therefore, with this understanding A draws on New York for the face of the bill, he must pay whatever it costs to transfer the result to Wilmington; in other words, the exchange is at A's expense. If there is any doubt about this it should form part of the terms of the contract at the time it is made.

7. Does the responsibility of the drawer and the indorser of the bill cease after same has been accepted, even if not paid at maturity?

A. If he does not meet his obligations the drawer and indorsers, on due notice of default, are alike successfully bound to make good the promise to the holder, precisely as if acceptance had been refused.

8. A buys foreign exchange of a prominent banker with agreement to send check for payment of the same by return mail. He fails to do so, and instead makes an assignment; however, he indorsed exchange to B, who took it in settlement of an account, giving his receipt in full, as he knows about the responsibility of the maker. Has the banker (maker) a legal right to stop the payment of the draft?

A. The banker is held for the amount of the purchaser of the bill, the latter taking it in good faith, and if he prevents its acceptance or stops its payment on the other side, he is liable not only for the principal, but the damages established by statute for its return protested.

9. A month ago we sold a bill of goods to a responsible party in a distant city of this State (N. Y.) on the following terms: Goods taken as is, weighed up flat, at price agreed upon and 30 days' interest added to amount of bill; settlement by acceptance of our draft at 60 days from date of bill. We shipped the goods as directed and sent to purchaser, by mail, invoice and bill of lading, and our draft for acceptance. The party retains our draft yet, and we cannot get it returned to us. He has written to us once in reply to our request for acceptance, and gave us an evasive answer. The conditions of sale were fully carried out by us, and no complaints have been made by purchaser. We would like to know:

1. By retaining our draft has not drawee made himself liable to us the same as though he had accepted the draft?

2. How can we compel the drawee to accept our draft and return it to us, and what is the best course for us to pursue in the premises?

3. What is the law governing such a case, and the law generally governing the matter of accepting time drafts?

A. The law of this State (N. Y.) has provided for just such cases and is very explicit; it reads as follows: "Every person upon whom a bill of exchange is drawn, and to whom the same has been delivered for acceptance, who shall destroy such bill, or refuse within 24 hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted, to the holder, shall be deemed to have accepted the same." At the end of the 60 days and grace suit may be

brought upon the draft precisely as if it had been accepted and returned to the holder.

10. From a correspondent abroad I received the following bill of exchange for collection :

"On the first day of August pay to the order of A three hundred pounds sterling.
To MESSRS. C & B, NEW YORK." B, MASTER SHIP X.

A dispute having arisen as to the manner of settlement, please answer the following questions :

Is the bill payable on the 1st, or on the 4th day of August ?

Has settlement to be made at the rate for 60 days, or sight prime banker's bills ?

Is the posted rate or actual selling rate to be accepted for settlement ?

A. All such bills, not being land bills, are subject to grace, and the acceptance is due on the 4th of August.

The 60-day rate governs.

The actual market rate for undoubted bills is all that can be exacted, but settlement is usually made by the posted rates.

11. £1,000.

London, September 24th, 1877.

At sight pay to the order of X Y Z one thousand pounds, and charge to account of
To M N, St. Louis, Mo. A B.

It was presented for collection by a bank. M N offered to pay on demand at rate current for bankers' 60-day exchange on London.

Bank threatened to protest unless draft paid at rate current for bankers' sight exchange on London.

1. Would bank have been justified in protesting ?

2. If yea, why ?

3. If nay, why ?

4. Can such a draft be collected in St. Louis by legal process ?

5. If yea, at what rate of exchange ?

6. Would the case be changed were the draft on New York instead of St. Louis, *ceteris paribus* ?

7. If yea, in what particulars ?

The custom of bankers in New York is to pay such drafts (containing also the clause "payable at the current rate of exchange") at the 60-day rate.

8. Has this custom any legal sanction ?

9. Can payment at a higher rate be enforced ?

A. There is no law in reference to such a case, as far as we know, save that custom will be maintained by the courts. The law supposes that in drawing and receiving an order of this kind,

both parties know what is the usual method of settlement, and that such custom establishes therefore the terms of the compact. Here the settlement for such a bill would be the 60-day rate, and we think the bank at St. Louis made a mistake in exacting the sight rate under threat of a protest. If suit were brought on the above in the United States Courts it is possible that judgment would be given for \$4,866.5 under section 3,565 of the Revised Statutes fixing the value of the pound sterling as the "par of exchange."

12. Can a merchant doing business in New York refuse to accept bills of exchange drawn on him by a merchant in a foreign country, because the revenue stamps which the laws of that foreign country demand are not on the bills of exchange when presented?

A. If drawn in England the document without the stamp is illegal, and the drawee should not accept it; at any rate he should not without requiring the affixing of the stamp.

13. What time is allowed for the presentation for acceptance of a bill of exchange drawn at 60 days on New York?

A. If the bill is drawn at 60 days from date it need not be presented at all for acceptance, as the holder, if he chooses, may wait until it is due before presenting it. If it is 60 days from sight, it must be presented "within a reasonable time," and exactly what this is must be left to the circumstances of each case. The Commercial Code of France fixes the limit according to the different places where the bill is drawn, but here there is no such limit. The bill should be forwarded by due course of mail, and when received at the location of the drawer, ought to be presented within a full day after it comes to hand.

14. Have there been any decisions in New York State on any case similar to the following? A paper (of which the following is a copy) is drawn, accepted, and indorsed:

NEW YORK, August 20, 1874.

Four months after date pay to the order of myself five hundred dollars with current rate of exchange on New York.
To John Smith, Louisville, Ky.

JOHN JONES.

The above is accepted by John Smith and indorsed by Jones to the Bank of Louisville. Does the insertion of the words "current rate of exchange" render the sum of money so uncertain as to keep the paper from being a bill of exchange?

A. The above is a proper bill of exchange ; like the addition of "with interest," the phrase "with current rate of exchange" has a well-known commercial meaning, and covers a quantity easily ascertained and defined.

15. Is the drawee who discounts a bill of exchange on a certified copy of the bill, with a duplicate bill lading attached (the original draft and bill of lading having been lost through the mail) justified in paying the certified draft?

A. If the drawee is protected against any use of the old bill of lading (that is, if it was to his order and consignment) he may pay the draft without fear.

16. A buys B's bill of exchange on C in London. C accepts the bill, and, failing before maturity, pays fifty per cent. and gets discharge in bankruptcy. B also goes into bankruptcy, paying less than fifty per cent. Can A rank on B's estate for the full amount of the bill or only on the balance unpaid by C?

A. If both estates are in bankruptcy at the same time, A can prove against both, and collect from each any sum they pay not exceeding the amount due him altogether.

17. What are the legal rights of the owner of bill of exchange who has remitted it to Europe with bill of lading attached; upon acceptance has surrendered the bill of lading; thereafter and before the maturity of the bill the acceptor fails; it being further observed that the said bill bears a clause of need address?

A. Upon the insolvency of the acceptor of a bill of exchange the holder in almost every foreign country has the right to protest it at once "for better security;" and where there is a "case of need" clause to apply to this direction for a second acceptance. If that is refused he may come back on the drawer and require security or indemnification. The rate of damages in such a case is governed by the law here if the bill was drawn in this State.

BILLS OF LADING.

1. What constitutes a date of shipment, the day on which a bill of lading is signed (which is generally the day on which goods are put aboard vessel), the day of clearance, or the day of sailing? For example: A sells B a parcel of goods, "to be shipped from a foreign port during the month of January." The goods are put aboard vessel January 30, and bill of lading is so dated, while the vessel does not

clear or sail for 30 days after that. What are B's rights under these circumstances?

A. In such contracts the date of the bill of lading has been settled as the date of shipment. This being in January is sufficient to meet the contract. Where actual clearance or leaving port before a given date is to be exacted, it must be specified in the agreement.

2. Are goods shipped from a certain port on a vessel leaving August 2, bill of lading for said goods being dated July 31, by law considered August or July shipments?

A. So far as we have been able to discover, after considerable search, the meaning of the word "shipment," in a legal sense, has never been decided. According to Webster it is "the act of putting anything on board of a ship or other vessel;" but we think the courts, if called on to construe the contract, would inquire whether or no this definition expressed the true meaning of the parties, and if they found that the word in such contracts is generally understood to carry the idea of sailing on the day of shipment, that they would give effect to that construction. If the vessel was advertised to sail in July, and made a bona fide attempt to go to sea, but was hindered by adverse winds, or like causes, we suppose there is little doubt but the transaction would be held to be a July shipment. And even without such an attempt it is still a question whether putting the goods on board in July does not answer the conditions of a contract calling for "shipment" in July.

3. Would a vessel be liable for short cargo—pieces or feet—under a bill of lading reading as follows: "Three hundred pieces (300), containing 50,000 superficial feet, more or less, all on board to be delivered"?

A. The "more or less," by a strict construction, applies only to the superficial feet, and we think the vessel would be required by an assignee of the bill of lading for value, to deliver 300 pieces.

4. A ships goods to B in Europe, say \$1,000. A gets three-quarters advance on invoice of \$1,000, say \$750, from banker C, in New York, by giving him a bill of exchange 60 days after sight, made to A's order and indorsed by A, drawn on banker D, in Europe, together with two bills of lading, certificate of insurance, and invoice, all duly

indorsed by A, as bills of lading and insurance certificate read to order. C sends bill of exchange, bills of lading, certificate of insurance, &c., to his correspondent banker E, in Europe, who presents the draft to banker D for acceptance. B, who has an account current with banker D, is notified a draft of \$750 has been presented to him for acceptance, and B will have to deposit or make good this \$750 before banker D will accept the draft. B makes good this \$750 and receives credit for say 55 days' interest before maturity of draft, as well as the amount of the draft, and B now gets possession of two bills of lading, certificate of insurance, and invoice. D now accepts draft and returns it to E without the bills of lading, insurance certificate, and invoice, and E holds draft for collection. Before maturity of said draft banker D has failed. Upon whom does the loss fall? Is not A released the moment banker E accepts banker D's acceptance of draft and surrenders the securities? Now should A be held as maker and indorser of the draft, and compelled to pay the same when returned to New York protested? Has he not the right to demand the identical papers he gave with the draft, such as bills of lading, etc., etc., or has the banker C or E the right to surrender the securities and still hold A as maker and indorser of said draft? Are bankers allowed 10 per cent. protest on this transaction, and how does this affect B? Who is entitled to the assets of banker D?

A. If the draft is duly protested A is held responsible for its payment, and only the draft need accompany the demand. Not the acceptance of the draft, but its payment or a failure to present and protest it, will release the drawer. The ten per cent. is allowed by law in this State on drafts returned from Europe. B is responsible for the balance of the account beyond the \$750; but in most contracts of this sort the shipper here answers the responsibility as to the banker, and the consignee (B) is usually only held to his agreement that the draft shall be accepted by D; if it is accepted it is then, as most of these engagements read, at the risk of the holder. A has recourse to D, and a claim on his assets.

5. A & Co. ship a boat load of corn from say Buffalo to New York, consigned to order of John Smith, Cashier. Bill of lading comes forward, and on demand of parties who buy the corn here, is turned over to them to secure title, and proves to be indorsed as follows: "Without recourse, John Smith, Cashier." What is the force of this indorsement, and does it release the bank in case of any question of title?

A. John Smith guarantees the genuineness of previous signatures and their regularity, but does not affirm the title of the shippers to the corn, nor their right to dispose of it.

6. We make advances on goods, shipped from a distant part of the country, consignors drawing on us through bankers at sight, with bill of lading attached. Goods are shipped to order, and bill of lading indorsed by shippers in favor of bankers. The bankers indorse bill of lading (which of course is surrendered to us on payment of draft) "without recourse to"—the bankers. We desire to know in regard to the legal effect of this indorsement, does it absolve the bankers of all responsibility, in case the bill of lading should turn out to be fraudulent—a forgery, no goods actually shipped, no such bill of lading signed by the transportation company? Would not the law compel the bankers to guarantee at least the genuineness of the bill of lading in spite of the indorsement "without recourse"? Has this question been well settled in law, and how?

A. The banker is not responsible under these circumstances to the drawee of a bill for the genuineness of the signature to the same, or for the genuineness of any of the accompanying documents, provided it has acted in good faith throughout, and was not a party to the fraud.

7. Will the JOURNAL advise us as to the usage, in cases where the shippers lose the ship's receipt, and require bills of lading without producing the evidence of shipment?

A. By proving that they are the shippers, and giving a bond to indemnify the master against any loss through the reappearance of the receipt, a bill of lading may be obtained.

8. Where a bill of lading, deliverable to order, is attached to a time draft, and forwarded therewith to an agent for collection without instructions, is not such agent required by law to deliver the bill of lading upon the acceptance of the draft? Will a sight draft (which in this State is entitled to grace), with a bill of lading attached, be held to be a time draft within the meaning of the law?

A. The Supreme Court of the United States has decided that where no instructions are given, the agent is justified in surrendering the bill of lading upon acceptance of the draft, and this would apply to a sight draft that was entitled to grace.

9. Are the owners liable when a captain or the agents sign a fraudulent bill of lading or counterfeit?

A. If a bill of lading actually signed by the master of a vessel for goods not on board will not bind the vessel, much less can a bill which is not only false in that respect, but is counterfeit besides, constitute the ground of a claim. The opening remark of Judge Davis of the United State Supreme Court, in the

case of the *Lady Franklin*, 8 Wall, 325, may be appropriately cited here. The Judge said: "The attempts made in the prosecution of this libel, to charge this vessel for the non-delivery of a cargo which she never received, and therefore could not deliver, because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here."

10. In a decision you say "there is no law which obliges a carrier to give any written receipt or contract for the delivery of goods." When vessels are loaded, say with lumber, etc., the shipper requires bill of lading in certain form in order that he may draw for cost of his shipment, effect insurance, etc. Without this he must be subject to much inconvenience, and probably loss. What recourse has he then if captains refuse to sign bills of lading as presented, or give proper voucher for receipt of cargo?

A. The books declare it to be the duty of the shipmaster to issue a bill of lading in common form for goods shipped on board. And though this is not a duty enjoined by statute, yet it was intimated by the court in the case of the *Mayflower* (8 Ware, 300), that in case of refusal to sign such a bill, suit may be brought against the vessel.

11. What is the meaning of the clauses in bills of lading "with *primage* and *average* accustomed," when *primage* is paid, and "without *primage* and *average* accustomed," when *primage* is not paid? and would the omission of the first endanger the rights of a vessel, or would the omission of the second endanger the rights of the shipper?

A. *Primage* is the small payment allowed to the master of the vessel for his care and attention to the cargo; and *average* in this connection is the right reserved to divide pro rata between the owners of the ship and the proprietors of the cargo any small items of expense for towage, pilotage, &c. The prevailing custom would be observed without the insertion of the words.

12. Are steamship companies justified in demanding as a right that shippers make out their own bills of lading in full, even to the calculation of the amount of freight due? Can a shipper compel the steamship company to issue and sign bills of lading for goods taken on board?

A. There is no law which obliges a carrier to give any written receipt or contract for the delivery of goods. Most shipowners

are willing to furnish and sign bills of lading, but some lines require their customers to submit the documents for signature.

13. Foreign steamship bills of lading usually contain this clause : "Freight payable at current rate of exchange for bankers' drafts on date of ship's arrival." Question: What is the current rate? Steamship agents contend: "Rate which consignee would have to pay for first class bankers' sight draft for an amount equal to his individual freight, even if same was only \$5 "

A. We presume that our correspondent has misquoted the bill of lading, as most of the steamship companies now insert the condition that the *sight* rate shall govern. But if this is not in the bill of lading, the freight is payable by immemorial usage (and settled by legal authority) at the sixty-day rate.

14. What responsibility is assumed by indorsers of bills of lading for goods shipped to order?

A. An indorser of a bill of lading assumes no responsibility in regard to the carriage or delivery of the property described, but may be held responsible for the bona fide character or genuineness of the document.

15. Is the bill of lading that a vessel brings with her the property of the consignee of the cargo, or is the consignee obliged to hand it back to the vessel, receipted, on the delivery of the cargo?

A. The vessel should have a copy of the bill of lading, besides the number which the captain has affirmed to for the use of the shipper. The ship may demand one of the latter, with the proper indorsement, when it delivers the cargo, and this is the usual custom.

16. Can railroads and vessels demand and retain bills of lading where goods are consigned direct? Would not consignee's own order be sufficient to obtain them? Have they any right to demand that they shall see invoices of goods for this information, to learn if they were properly named and weighed as stated in bills of lading?

A. It is a good delivery where one is made to a named consignee, because that fulfills the undertaking of the carrier; but he has the right, if he chooses, to demand the surrender of the bill-lading, as that also is provided for in the document. He has nothing to do with the invoice or other papers passing directly between the parties.

17. If the master of a vessel signs bills of lading for a lot of cotton on delivery of press receipts, with the shippers' guaranty against loss by fire, or otherwise, attached, and after said bills of lading are consigned and hypothecated, the said cotton is destroyed by fire while in press, and the shippers not being insured and unable to replace the cotton, on whom does the loss fall, the shippers of the cotton not being able to respond? Is not the signing of bills of lading as above a criminal act?

A. A bill of lading signed by the master where the property was never delivered to the ship, or in the captain's custody, will not bind the ship nor its owners, without express authority from the latter.

18. A vessel is chartered at London at 58 shillings per ton for a round voyage to Brazil and back to United Kingdom, or, at 50 shillings to Brazil and back to New York, finishing her round trip there. The charter gives the vessel a lien on the homeward cargo for full amount of freight of the round trip, or balance of it if she is paid anything on account in Brazil. The charterers' agents in Brazil recharter the vessel at say 20 shillings and 5 per cent. to New York, and insist that captain sign bills of lading without prejudice to sub-charter party. The captain refuses to sign them or to recognise this charter party, and sails without signing bills of lading, and now holds the cargo for balance of freight of his round trip.

1. Can he do this, or demand more than the sub-chartered rate?
2. Was he not obliged to sign bills of lading even though the clause was inserted "as per Brazil charter party?"
3. Could the charterers in Brazil not have libeled the vessel, and held her till the captain did sign the bills of lading?
4. The charterers' agents signed the bills of lading; had they any right to do so without an order from the captain, and are such bills of lading negotiable?
5. Should not the Brazil charterers have refused to accept such bills of lading?

A. 1. There is some conflict of authority on the question whether the property of a third person can be thus subjected to a lien for freight due from the charterer, the affirmative having been held in the English case of *Faith v. East Indian Company* (4 Barn. and Ald., 630), cited with approval in the United States Supreme Court of *Gracie v. Palmer* (8 Wheaton, 605). The more equitable rule would appear to be that the lien should take effect only to the extent of the freight money due, or stipulated, on the specific goods in question, being the property of third persons (*The Volunteer*, 1 Sum., 573; *Christie v. Lewis*, 2 Brod. and B., 410).

2. The object of the words sought to be inserted in the bills of lading being to waive this lien on the part of the shipowner, the master was not bound to sign such a bill (*The Mayflower*, 3 Ware, 300). And if he had signed, the bill would have been ineffectual to determine the controversy above discussed, the master having no power to waive a condition of the charter (*The Salem's cargo*, 1 Sprague, 380).

3. Accordingly, though a libel suit might have been brought for the purpose specified, we do not think it could have been successful.

4. A bill of lading not signed by the master, or agent in possession of the vessel, or some one in his behalf, is a document for which we find no precedent in the books on maritime law.

The truth is, the agents in Brazil should have secured the captain, or at least tendered him the difference in freight, before asking him to sign the bills thus tendered for his signature. The captain, in our opinion, was justified in his refusal.

19. A vessel, either through causes of bad weather or inability to receive on board all the cotton of her cargo that may be tendered in one or more days, the master signs bills of lading in advance where, through his personal knowledge or that of the consignee of the vessel (they having orders on the presses for delivery) know that said cotton is ready for delivery to the vessel as soon as the causes above referred to are removed.

Would bills of lading so executed be binding against ship and owners? And further, would said cotton be considered in the custody or possession of the master?

A. The original rule, that a ship cannot be bound by a bill of lading, signed for merchandise not actually on board, was strongly laid down by the Queen's Bench in the well known case of *Grant v. Norway*, 10 C. C., 665, where it was said by the Chief Justice that "the very nature of a bill of lading shows that it ought not to be signed until goods are on board, for it begins by describing them as shipped." So in the later case of *Hubbersty v. Ward*, in the English Exchequer (Eng. Law and Eq. Rep., 551), Chief Baron Pollock said: "We think that when a captain has signed bills of lading for a cargo that it is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that

are not on board, to charge his owner." These authorities were accepted by the Supreme Court of the United States in the cases of the Schooner *Freeman*, etc., v. *Buckingham et al.*, 18 How., 182, and in that of the *Lady Franklin*, 8 Wall, 325. At a later period the English courts modified the rule so as to cover goods in the master's custody, though not on board the ship. In 1868, the case of the *British Columbia*, etc., Company v. *Nettleship* was decided in the Common Pleas (18 L. S. Rep., 291). There the master, through carelessness, signed bills of lading for a box of machinery, which was delivered on the quay where the vessel was loading, but was never put on board, and the court left it to the jury to say whether or no it had been actually placed in the custody of the shipowner's servants. The jury found that it had been, and the judgment accordingly was that the shipowner was bound. All the judges concurred, the principle being briefly stated in one of the opinions to be "that delivery to the agent of a ship for the purpose of loading is sufficient to create liability on the owner's part."

The same case has not, however, so far as we know, been litigated in our courts; and, though it is likely they would follow the later English authority on this point, it is to be observed that this does not by any means go so far as the case of our correspondent requires. The goods were there actually on the quay within reach of the ship's tackles, and, as the jury found, in the custody of the ship's servants. Possession of an order on the press, however, could not, in our opinion, be considered actual custody of the cotton, at least without acceptance of the order at the press, and distinct separation of the bales, so as to constitute a good delivery. The direct or implied assent of the vessel owner might perhaps alter the case somewhat, but even then no implication could be drawn except from specific proof of knowledge or authority sufficient to estop the owner from contesting the master's acts, as beyond the usual scope of his employment.

BOOKKEEPING.

(SEE ALSO SETTLEMENT OF ACCOUNTS.)

1. Two persons enter into co-partnership; one furnishes all the capital needed to begin with, say \$500, and other furnishing no capital. In the articles of co-partnership that they have had drawn up, it

is stated that \$250 has been contributed in cash by each partner, whereas one contributes nothing, but agrees to give his individual note for the \$250 to the other partner. Are the articles of partnership right in this respect in reading that each contributes half of capital in cash? and if not how should they be worded to cover this point? Also please state how the entries in regard to the capital under the above circumstances should be made in the books upon the commencement of business?

A. If the note is duly executed and delivered the articles are all right. Each has then contributed \$250, and B has borrowed of A \$250 for this purpose. The books may then credit each partner with half the capital. A will hold B's note for the contribution of the latter, to be paid as soon as B has the money, or by consent to be charged against his account.

2. A Building and Loan Association was organized in 1876, and the first series was started in that year, and each succeeding year a new series was begun. The profits for the first year as a matter of course belonged to the first series, but as each succeeding series was begun the question of an equitable division of the profits presented itself, viz.: What proportion of last year's profits belonged to each of the first, second, and third series?

The business of the association runs about as follows: At each monthly meeting the stockholders of each series pay their fixed subscription of \$1 per month per share, the borrowers paying in addition to their subscription the amount of interest per month on their loans. The money then, although coming from different series, is pooled and loaned to the highest bidder, except when stockholders wish to withdraw, in which case they are paid out of the above-named pool, a certain percentage of the gains being deducted from the association value of the stock. The amount so deducted is credited to the series from which the stockholder withdraws, although the money was paid out of the common pool, and if loaned would earn a profit for each series, whereas in this case it only earns a profit for one series.

A. In answer to the above it is evident that the question of the equitable division of the profits of the association first presents itself at the beginning of the second fiscal year.

Each series is entitled to its own legitimate earnings. As far as these proceed from fees it is easy to determine to which series they belong. The earnings from investment of funds, considered as "a common pool," is the apparent difficulty. The cash book should be so kept in columns as to show the receipts and disbursements, and consequently the *cash on hand*, for account of

each series, day by day. The expenses should be kept in a separate column. When a loan (or deposit in a trust company) is made, said loan or deposit should be made for account of series No. 1 and No. 2 respectively, and so charged against each series pro rata of the cash on hand belonging to each; and whatever interest or income is derived from the investment should be credited *monthly* to the profit and loss account of series Nos. 1 and 2 respectively, pro rata of the investment, whether received in cash or not.

I would then charge each profit and loss account with the expenses of the month, pro rata of the profits shown by each. These profit and loss accounts will then show, at the end of each month, the net earnings of each series. Proceeding each fiscal year, in like manner for each existing series, I think the desired result will be fully obtained.

3. To determine the profits, say a year's business, which is the most proper, to inventory stock, etc., at cost or market value, and what is the custom among business houses?

A. The correct way is to inventory the stock at its current market value. As it would involve very great labor to estimate each article by itself, the usual course is to take the stock at its cost, and then to make such allowances or deductions on the gross result as will bring the total to the actual market value.

4. I am a bookkeeper, and it is my custom to take off a trial balance of my books every month. The merchandise account properly shows a debit balance every time; what would it signify if, in the regular routine of bookkeeping, the merchandise balance should be thrown upon the credit side, the trial balance being correct, or proving the books to be correct? If a remedy is necessary how should it be remedied, there being stock on hand at the same time?

A. The merchandise is debited with the stock at commencement, and with all purchases. It is credited with the sales, and at the closing of the books with the stock on hand, the difference being the profit or loss. If in a trial balance made to prove the books the difference in the merchandise account stands on the credit side, no notice need be taken of that fact, since such an event is possible and not improbable.

BROKERS AND BROKERAGE.

1. We employ a broker in another city, say Boston, to sell a lot of goods for us. He received an offer for the goods at a certain figure, delivered in that city. If we accept the offer do we pay brokerage on the amount we net from the transaction, or on the face of the bill, without deducting freight? When no previous arrangement has been made as to brokerage, what percentage can a merchandise broker justly claim?

A. The brokerage will be governed in amount by the usual charge in Boston on the description of merchandise, whatever it may be, and will be calculated on the bill rendered to the buyer.

2. We beg to ask if we are justly entitled to charge our commission on the duty-paid price of goods sold for a party abroad, such goods having been sold at that price, less the duty in bond? Also, is the broker entitled to charge brokerage on the duty paid or bond price?

A. If the sale was made in bond, that price governs both the commission and brokerage. If sold delivered out of bond or duty paid that price will govern.

3. On the 31st October we sold through a broker here 12 casks of merchandise for export to Canada, on a sample, and on arrival of the goods the consignees rejected them on the ground that they did not come up to the sample, though we gave our Canada friends an opportunity to examine every package, in handing their agents here a delivery order to the bonded warehouse, from whence they took the goods and shipped them. After nearly seven months we effected a settlement, through the good offices of their agents—not the broker—allowing nearly 30 per cent. from the face of the invoice; and here the question arises: Are we bound to pay the broker his commission if his contract does not hold good?

A. The brokerage is legally due notwithstanding the difficulty, and would have been due if all the goods had been returned.

4. A firm with whom I do business, determining to abandon a manufacturing department of their business, ask me to find a purchaser for their factory, promising me if successful \$100. I discover a gentleman willing to buy, with whom several interviews are held, resulting in his taking a five years' lease of the property, with the privilege of purchase on or before expiration. On requesting *some* compensation for my services I am refused, on the ground that I failed to make a sale. In the premises, what am I entitled to?

A. Our correspondent^{*} is certainly entitled to, and can legally collect, some compensation for his trouble. We think that half the offered pay should be the least the owners ought to give him. The contract may result in a sale, in which case he could recover the full amount.

5. A ship broker has placed in his hands directions to secure a suitable vessel for a certain freight. In the meantime, while he was looking for such a vessel, other parties called upon the merchant and were referred to the said broker. One of these parties, without any authority, spoke to the agent of a vessel and offered the freight. He then again saw the merchant, and without naming the vessel said he could charter a vessel for a certain sum. The broker in question afterward saw the agent of the vessel, who said that he had had the freight offered, and when told that the party who offered it did so without authority, he sent the captain up with the first broker, who introduced him to the merchant and named the vessel for the first time. No bargain was made then, as the captain refused to accept the terms offered. The merchant afterward sent a telegram to the second broker and authorized him to take up his vessel at the sum he named (not knowing it was the same offered by the first broker). The charter was finally made through the second broker, of the vessel named and introduced by the first broker, the merchant having written letters to the agent stating that the first broker was authorized, and that as he had referred the second broker to the first, he signed the charter party, supposing it came through the first broker, although by the hand of the second. The question now is, did not the introduction of the captain and the first naming of the vessel by the first broker entitle him to the commission, both in equity and law?

A. According to the decision in the case of *Ludlow v. Carman*, 2 Holt, 107, it would appear that the second broker alone is entitled to the brokerage. There are many cases where it is difficult to decide, and even where the brokerage is legally due to one it is a case of real hardship to the other, who has done more to earn the pay than his successful competitor.

6. A, the principal, places 3,600 tons of iron in the hands of B, a broker, to sell. B places the iron in the hands of C, another broker, who sells the iron to D, subject to trial of 100 tons. D tries the 100 tons, but finds the iron unsuitable and so notifies C, who immediately offers the iron to E; but B also offers the iron to E without withdrawing the iron from C. E buys the iron of B, as B told him that C no longer had the iron to sell. E had been previously made known to B by C, and C regarded E as his customer. The question is, has C any claim against B for brokerage on the sale of the 3,500 tons to E?

A. E's testimony must be the main dependence in settling this question. If the iron was brought to his attention by C, and his mind was subsequently made up, on C's solicitation and representations, to buy the goods, we think C earned his commission, and has a good claim against A therefor.

7. Is a broker legally entitled to his brokerage when he has sold a cargo of goods to be shipped from a certain port in Europe, while the same comes from a different port? The market has declined and purchasers refuse to accept the cargo on the ground that the sellers have not fulfilled their contracts. The sellers thereupon accept the buyers' decision and do nothing to force the goods on the buyers. Please give us the law on this matter, leaving out customs or usages, or also what a broker's policy should be; and if cases of this kind have been decided by any court of this State (N. Y.) please cite such decisions.

A. A broker under contract to effect a sale of goods to arrive, who effects the contingent sale, is entitled to compensation for his services, even if the goods do not arrive and the sale is not consummated, unless his principals have stipulated that he shall share the chances of non-arrival. N. Y. Common Pleas, 1867, *Paulsen v. Dallett*, 2 Daly, 40.

8. Is a broker entitled to his brokerage when he has sold a lot of goods to arrive, payable 60 days after delivery, and has passed accepted contracts to both buyer and seller; the seller refusing to deliver the goods, because the buyer has failed since the contract was accepted, and refuses to pay cash less interest?

A. The broker is legally entitled to his brokerage in the case described, but it is the ordinary custom, or at least a very common one, to waive this charge when for any reason there is a failure of delivery, although the brokerage has been fairly and fully earned.

9. I gave a real estate agent an order to sell my house at a certain figure. He informs another agent of it, who brings me a party that makes me an offer which I refuse. He then leaves, saying he would be back in the afternoon with his wife, but fails to come until the next day in the evening, and not with his wife but the real estate agent, and is then ready to take it at the figure I placed upon it at first. In the meantime I concluded I would not sell at all, but withdrew it from the market, and informed the agent by postal accordingly, which he claims he did not receive. He now claims commission. There having been no sale is he entitled it?

A. On the assumption that the second agent was recognized, that the offer to sell at a certain figure was held out to him the same as to the first agent, that the offer was not limited to the day when the purchaser first called, and that there was no effectual revocation, it must be granted that the agent earned his commission. As to the sufficiency of the revocation, we know of no adjudication in point, but we are disposed to think it insufficient, unless it can be shown that it actually reached the agent before the intending purchaser was ready with his acceptance.

10. A broker makes a sale of certain goods to arrive. These goods on arrival of ship are damaged to such an extent that we sell them at auction for account of the underwriters. Can the broker who made the sale claim a brokerage, and if so on which price is it to be reckoned, that in the sale-contract, or the price realized at auction?

A. The legal claim of the broker is established when the sale is concluded and the bargain ratified by both buyer and seller. If the goods never arrive we suppose that he can collect his fees. But it is the custom, as we understand, in most branches of the trade for the broker's remuneration to depend on the carrying out of the contract up to actual delivery; so that if the bargain fail of its completion he does not collect any brokerage. If he insists on his legal rights the brokerage would be due on the original sale, but we think most brokers would not take that ground.

11. Can a real estate agent collect commission for letting a house which at one time was in his hands, but since taken out and let to a party who, through his instrumentality, the owner became acquainted with?

A. If an agent introduced the tenant to the landlord while the renting of the property was in his hands, and out of that came the subsequent bargain, he could, probably, collect his commission.

12. A broker in real estate entered into a joint speculation with me in the purchase of a piece of land, I to advance the money at legal rate of interest and he to receive one-third of the net profit as his share of the speculation. The land was sold at a loss, and I learn that the broker has received about \$5,000 for commissions connected with the purchase, and for which he has not accounted to me. Have I not

a just and legal claim against him for two-thirds of the commissions received by him in the matter?

A. The net profit may fairly be reckoned as having no reference to the brokerage, and with this understanding the broker could not be expected to divide his perquisite with his partner in the speculation.

13. A, residing in Canada, procures for B, residing in New York, from C, also residing in Canada, five thousand dollars gold coin at six per cent. per annum, but wants of B a written obligation to pay him (A) an annual commission of two per cent. as long as B keeps the money of C. If B gives this obligation, can it be considered as usury, and can A enforce its payments?

A. The fact that a borrower pays a broker a commission for his services in procuring the loan, in addition to the lawful interest paid to the lender, does not render the loan usurious, provided the broker acts as agent merely, and is not himself the person making the loan, and the lender receives no part of the commission.—United States Supreme Court, 1828, *Coster v. Dilworth*, 8 Cow., 299; 1830, *Barretto v. Snowden*, 5 Wend., 181.

14. Suppose a broker, entirely through an oversight, neglects to complete an order which he has from a customer, and advises the customer only of such portion as was filled, and that upon discovering the error a change in the market meanwhile permits him to execute the unfilled portion more advantageously for the customer. Now, since he would have been responsible to his customer for any loss incurred by his oversight, is he on the other hand obliged to give the customer the benefit which has actually resulted from the circumstances as described?

A. He is both legally and morally obliged to give his principal the benefit of the decline, at which in consequence of his oversight he was enabled to execute part of the order.

15. Will you please inform us if John Smith, who says on his card that he is a broker in fruits, spices, etc., and has a corresponding broker in the West who sends his orders to Smith, and he buys his goods just where he pleases, is he (Smith) agent of the buyer or seller?

A. For some purposes, such as signing a contract within the statute of frauds, the broker is agent for both parties. But primarily, says Story, he is deemed merely the agent of the party by whom he is originally employed. This statement no

doubt covers the matter of commissions; and if the person is employed by, or holds himself out as the agent of, the buyer, as in the above case, we think he cannot claim to be the agent of the seller, for the purpose of charging him a commission.

16. A note broker brings to our office a mortgage note for \$1,000 signed by John Smith and indorsed by James Brown. We buy it, and afterward find that the name of James Brown was forged. The broker makes no statement about the note, simply hands it to one of our firm, naming the rate, and gets a check. Have we any claim on the broker? Suppose the broker said the indorser of the note was first-class and on his statement we bought it, would this make the broker liable? Please give us your views about the liability of a note broker, how far he can go without danger, and how he can make himself liable. Can an interested party come into court to prove a signature or to prove that a signature was not that of his partner or his own?

A. A note broker is responsible for all the money he receives for which he has not given the promised equivalent. In the case under notice the buyer of the note can recover the price paid, with costs. Interested parties are not now excluded from the witness box.

The Rhode Island Supreme Court, in *Aldrich vs. Jackson* (5 R. I. Rep., 218), states the doctrine in the following terse form: "The vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signature of the previous parties to it." The same doctrine is held in *Terry vs. Bissell*, 26 Conn. Rep., 23; in *Thrall vs. Newell*, 19 Verm. Rep., 202, and elsewhere.

17. A requests a broker to sell some exchange, and the broker reports in writing that he can realize for it \$4.99 per pound sterling, making \$7,387 currency. In delivering the bills of exchange the broker finds that he has made a mistake, the price he was offered for the exchange being only \$4.78. Who should suffer the loss of the difference in the proceeds, admitting that \$4.99 was about 1 per cent. above, and \$4.79 about 1 per cent. below the market rate?

A. The broker is responsible: he must furnish a buyer at \$4.99 or return the exchange. But where a mistake has been made the parties, if they choose, may compromise or leave the settlement to arbitration.

18. If A buys what purports to be B's note from C (who is a note

broker), and the note is forged, is C responsible to A for the amount of the note?

A. The note broker who sells a note bearing a forged signature, although he is ignorant of its character, is liable to the purchaser for the whole of his damage in the transaction. The note broker does not guaranty that B will pay the note, but he does guaranty that B has agreed to pay it, otherwise the thing sold is not in any sense a merchantable article.

19. A party in Tennessee telegraphs a cotton commission firm in New York to buy 100 bales December cotton and to sell whenever one-half cent a pound higher. It is bought, and amount required, \$2.50 a bale and commission, remitted. After receiving letter and statement from New York, Tennessee finds that under the contract reported the cotton is deliverable by the seller at any day from the 1st to the 31st of December, upon five days' notice to buyer. Tennessee writes New York that that is not the kind of contract he wanted, and that if it cannot be changed so that he could sell whenever he (the buyer) wanted to, to cancel the contract without loss or charge to him. New York thereupon sells cotton without notice at a loss to Tennessee. T repudiates both purchase and sale, and demands the return of his remittance of \$2.75.

A. We think, if the exact story is told, that New York must return the \$2.75 to Tennessee. It does not seem to us that the first contract was justified by the terms of the order; but if so the New York house had no right to sell to Tennessee's prejudice on receipt of the second order.

20. A local broker buys of a local merchant a bill of goods, handing the name of a merchant in a distant city as the purchaser. A contract with shipping instructions is sent to the seller and the goods are got ready for shipment. At this point the broker directs the seller to delay shipment, and later, makes the statement that through the miscarriage of a telegram to his correspondent who forwarded the order, notifying him of the purchase, the buyer declines to take the merchandise. The market meantime having declined, what recourse has the seller? Is the broker bound to compel the original buyer to accept the goods, or failing in that, furnish the seller with another buyer? Or, failing in that also, should he (the broker) assume the loss which results to the seller through his inability to place the goods at the price at which he took them? In short, how far does the responsibility of the broker go in the premises, he being able to show that the miscarriage of the message and the consequent rejection of the goods was through no negligence of his own?

A. We do not see that the seller has any redress for his disappointment.

21. A, an importer, buys of B, an exchange broker, certain bills of exchange drawn by C, a banker; in the transaction A does not come in contact with C. We will assume the mail closes on Wednesday, and as usual B sends the exchange to A on Tuesday, and A sends his check or money to B on Wednesday after mailing the exchange. Subsequently B fails to pay C for his exchange, and suspends payment. Can C hold A for the amount of exchange, and can he stop the acceptance or payment?

A. The general rule is, as observed by Judge Peckham in the case of *Higgins v. Morse*, 34 N. Y. (Court of Appeals), 417, that a broker employed to sell, has no authority as such to receive payment. But, "where the person contracting for the sale has the property in his possession, and delivers it, he is clothed with the indicia of authority to receive payment, especially when the owner is not known." A decision in point was that by the Supreme Court in *Lentilhon and Martin v. Vorwerck*, reported in *Lalor's Supplement to Hill and Denio*, 443. There an exchange broker negotiated a sale between plaintiff and defendant, the plaintiffs delivering the bill to the broker, who received payment and died insolvent before paying over the money. The court held that the defendant was not bound to pay the price of the bill over again, that his payment to the broker was a discharge of his obligation. This case stands unreversed as an authority in this State, though of course it is liable (as a possibility) to reversal in case the question should be carried to the court of appeals. It is to be borne in mind that the decision turned upon the delivery of the bill to the broker, without notice to the customers to pay the principal. The court intimated that in such a case the customers should have been notified. Under these circumstances, while the question may not perhaps be considered finally settled upon this principle, payment to the broker is *prima facie* good if he is entrusted with the bill without notice. Otherwise, if he receives the money and does not pay it over, the buyer can be compelled to pay a second time, to the principal direct.

22. I bought from H, a broker, 100 shares of stock, for \$1,000; paid \$900 cash, and I owe him \$100, on this purchase. H failed and

made an assignment, and the assignee wants me to prove my debt. How shall I do this? On the day of H's failure, the stock sold at 7, to-day at 12. Had H any right to dispose of my stock?

A. If the stock had been transferred H could not legally sell it, but the statement shows that it was stock sold but not delivered. We think the \$900 and interest is the better claim to make.

23. Suppose I were to sell a lot of goods to a stranger, through a broker, and in a few days later that stranger seeing in the paper that I had received a similar lot of goods, calls upon me without the broker's knowledge, and buys that second lot, is the broker entitled to any brokerage on that second lot?

A. If this statement is literally correct and is the whole of the story, the broker is not entitled to any brokerage on the last lot.

24. A represents a manufacturing company on commission and calls upon B who requires some of their work, but is not then ready to close the order. A leaves a card of the manufacturing company with the understanding that B will notify him or the house when ready to purchase. B notifies the company and they close the order without informing A that they are in receipt of word from B. Is not A entitled to commission on the order?

A. As A did not really make the sale he cannot claim the commission as a matter of right. He might leave a card with every purchaser in the country, and ask for commission on the entire sales of the company. It looks as if there had been too little consideration for him, however, on the part of the company, or the buyer, or both, in the case described.

25. Two brokers representing respectively seller and buyer agree as to the value of a certain article of merchandise, based on a given standard, and send their principals each a certificate to that effect signed by both brokers. In law, in the above case, is not the brokers' decision final and binding upon their principals without the right of appeal by the principals?

A. A broker has no authority not delegated to him, or implied in the trust committed to him. In the case presented, unless the principals agreed to be bound by the award or engagement made in their name by their brokers, they cannot be legally held until they have confirmed the same.

26. A, some ten days before writes B, both brokers, to know if certain bonds could be sold at 50. B writes in intervals of some four

days apart, saying they would bring first 25 then 37½. A replies, asking if they could not be carried to 50, as this was the owner's price, who lived in the country and that it would take days or so to communicate with him. B therefore sells at 50 and charges one-fourth per cent. commission, making 49½ net to A. A denies B's authority to sell.

A. It may be a nice question whether B was justified in selling at 50 by the terms of the correspondence, and this could only be settled by a careful examination of it; but it is a fair inference from the statement, as it seems to us, that this was A's desire, and without further information we should justify B in his action. A asked B if he could not get 50 cents and told B this was the owner's price; if this did not mean that A wanted B to sell the bonds at 50, it was at least well calculated to convey this impression.

27. A has some property for sale, and informs B of the same, asking him to look for a purchaser. B meets C and inquires if C would buy at a very low figure, and C says he would look at property, as he knows a party desiring to purchase. B introduces C to A and makes engagement to bring a purchaser. C promises B one-half commission if sale is consummated. A sells the property to C's friend without the knowledge of B, and C refuses to divide commission. Can B recover his share from C, or must he look for payment from A, or is B not entitled to any share?

A. As B did not introduce or negotiate with the purchaser, he cannot claim commission from A, and as his contract with C was verbal he cannot legally collect of him.

COMMON CARRIERS.

1. A ships a bill of goods to a customer in New Orleans, and requests B & C (who are the agents of connecting line of steamers running from New York to New Orleans) by letter to ensure them on their open policy for \$500, and let charges follow with freight. A gets no reply to his letter, nor is it returned to him, and it happens that the goods are not covered, either purposely or through neglect. Should the steamer be lost at sea, can the owner of the goods recover the \$500? Bill of lading is given at Richmond, but nothing is said as to insurance.

A. Unless the agents have undertaken by an agreement expressed or implied to insure in obedience to such instructions, they are not responsible for their failure to comply and the loss will fall on the owner.

2. Having purchased a year's commutation tickets of the Delaware, Lackawanna & Western Railroad, and on the first of the present month I happened to have them at the wrong end of the line, which necessitated my paying fare on the cars, and for which payment I received a ticket redeemable at any office of the company for 10 cents, while the fare I paid was 35 cents; now, in equity, is not this corporation, when they refuse to refund me the full fare I paid on the cars, exacting of their patrons double pay for one service? And do our laws when they permit corporations to do business in the State allow them this privilege?

A. The commutation ticket is purchased on the express condition that it shall be shown or used. If the purchaser leaves it at home he has no right to insist that the company shall make the loss originating from his own carelessness wholly good to him.

3. Can the presentation of a shipping receipt for signature, specifying "one thousand kegs gunpowder," be taken as a "note in writing" within the meaning of the law, or whether a written letter of notification to the master should have been previously delivered?

A. A description of the article plainly written on the receipt to be signed, if presented at the time of shipment, will answer the requirement, if the attention of the receiver is duly called to it. But to avoid all disputes, it is better to have the notice on a paper which can be left with the freight.

4. We have parcels of goods arriving from England, deliverable to us at the port of New York. We wish to know if we are obliged to receive the goods in Brooklyn, Jersey City, or Hoboken; or, are the steamship companies and consignees of vessels obliged to deliver goods in the city? Are there any decisions on this point?

A. According to present custom all such goods must be landed on Manhattan Island, or, the carrier must pay the ferriage and extra costs (if any) of cartage. But there is no law to govern, and when it becomes customary to waive the right, a landing in Brooklyn, Hoboken, or Jersey City may answer. The Cunard Line used to reserve in their bill of lading the right to discharge across the river. No carrier can otherwise compel a consignee to receive goods except on this island.

5. Is there any law regulating the delivery of packages by express companies to parties occupying an upper office in a public building, or a flat in a private one? Nearly all the drivers refuse to bring packages

further than the front door. Are they legally right, or should they deliver them at the door of the office or apartment occupied by the consignee?

A. An express company is bound to deliver the package to the person named as consignee, and to place it within his premises. It is not sufficient to leave it on the sidewalk if the office is on the first floor, or to leave it in the lower hall if the office is up stairs. A man who has an office below cannot insist that the carrier shall take the package up stairs; but one whose office is up stairs may refuse to accept delivery unless the package is brought to him at the room or place where he transacts his business. We have noticed the habit of the express companies and have heretofore commented thereon. There is no warrant in law for the delivery on the sidewalk of a package that may easily be carried inside; and if the office of the consignee is on the second, third, or fourth floor, he may require that the package be brought thither to him.

6. Has an express company the right to exact an extra charge for the city delivery of a package consigned say to Sixtieth Street, and forwarded from Buffalo, expressage paid? If entitled to such a charge can they demand for the service more than the usual rate of the best city express companies?

A. Express and telegraph companies are a law unto themselves. As the law is commonly understood if the package or message is properly directed and duly prepaid neither of these messengers can exact anything extra for its delivery. But both of them will do it, and we often have dispatches and parcels on other people's business sent to our residence, and duly directed with the name and number, the carriage of which the senders have prepaid and suppose we are receiving without cost to us, on which a further sum is demanded and collected, because of the increased distance from the average centre of business.

7. A ships to B on his own account 100 bales of cotton, which B sells for A's account to arrive. The cotton was shipped December 23, but on March 10 the railroad company notifies A that 40 bales were burned in December in transit. B was forced to go into the market after cotton had advanced from $1\frac{1}{2}$ to 2 cents per pound, and replace the cotton. Should A bear the loss, or should it fall on the railroad company, for if they had notified either A or B at the time the cotton was burned it could have been replaced without any loss to A?

A. The carrier was bound to give notice of loss at once to the consignee. The measure of its liability in case of failure to deliver is the cost of replacing the goods at the date when the consignee was notified, and might thus have protected himself.

8. Grain received here by rail is discharged by the railroad company into elevators, and at 11 o'clock each day the elevator receipts are sent to the consignees. Thus consignees whose grain arrives after 11 o'clock A. M. to-day will have no knowledge of the fact till to-morrow at that hour. Should such grain be destroyed by fire to-night while in the elevator, on whom would the loss fall, leaving insurance out of the question?

A. The courts have decided that where freight is delivered on the dock it is at the risk of the carrier until the owner has been notified and has had an opportunity to take it away. If instead of the dock the carrier puts it into an elevator, the same rule will apply, and the carrier is responsible to the owner until he has been notified of the delivery and had time to protect it.

9. Is a common carrier liable as such, or as warehouseman (which latter capacity is liable without hire, receiving neither storage or wharfage), for loss or damage by fire to goods delivered to him and waiting shipment or ex-ship and waiting the convenience of consignee?

A. It is usually understood that a common carrier as such, if he is not exempted therefrom by special agreement, is liable for a loss by fire of all goods received by him for carriage, and up to the time that he has tendered delivery to the consignee, or given notice to the latter with reasonable time for him to remove the property.

10. When goods are shipped by several connecting lines of railroads and steamers on a through bill of lading, on a through rate of freight, is, or is not the last carrier responsible to consignees for short packages, and what is the best method of compelling settlement in such cases?

A. If the consignee can prove delivery in full to the first carrier, delivery to the second will cast on him the burden of showing that the shortage did not occur while the goods were in his custody. Such, at least, is the effect of the Supreme Court decision in the case of *Smith v. N. Y. etc. R. R. Co.*, 43 Barb., 225. If it did so occur, he can be held responsible, by suit, if he

will not otherwise answer the demand. If the shortage occurred before delivery to him, the previous carrier must be held.

11. A ships to B a certain lot of cotton by steamer; the steamer happens to have a similarly marked lot of inferior cotton and gives B five bales of them. B's agent or warehouseman receives the cotton as tendered by boat, and the error is not discovered for four weeks. B reports case to A and he says he shipped no such bales. An inquiry substantiates this statement. The steamer claims to have delivered the correct mark and number of bales, alleges laches, and says she is not liable.

A. We think the steamer can be held for A's damage. Due diligence on the part of the carrier would have noted a second lot of cotton marked the same as one already shipped, and would have added a fresh shipping mark, or separated the cotton in a way to avoid the error.

12. A B, merchants, ship a cargo of goods to foreign merchants, G H, taking bills of lading to order. They draw a draft at 45 days' sight on G H for amount of invoice, attach bills of lading, and negotiate the draft, with documents, with their local bankers, C D, who in turn send the draft with documents to E F, bankers in New York. E F in their turn send the draft alone (having retained the bills of lading) to their correspondent, who present it to G H and it is accepted. The vessel arrives before the maturity of the paper, and the master (being cognizant of who were the consignees) delivers the cargo to G H without production of the bill of lading. After discharge of the vessel and before maturity of the draft G H fail, the draft is dishonored, the bills of lading still remaining in the possession of E F. Is the vessel liable for delivering the cargo under the circumstances, and whose business is it to enforce this liability? If the vessel is not liable, who bears the loss?

A. The question is a little inconsistent. If the cargo was shipped to the order of the shipper, and bills of lading thus signed, then G H were not the consignees of the cargo, and the captain could not have been "cognizant" of that which was not true. We suppose, however, our correspondent to mean that the captain knew the cargo was designed for G H, and so delivered it to him without authority. Of course in that case the ship is held for such a violation of the contract, since the bills of lading promised to deliver it to the order of A B, and no such order had been received. The one who holds the bills of lading, awaiting his indorsement, is the proper one to enforce the liability.

13. We received by steamer 11 cases of goods; of these, two cases were ordered for examination to the public stores. We were waiting for these two cases for three days, when we finally sent to the Appraiser inquiring why they were delayed. He then informed us that he only received one case, and could not pass the entry until the other case came to the public stores. We found out after a good deal of trouble that by a mistake the Merchants' Dispatch had taken the missing case to Canada. Their excuse is that some cases similarly marked came in bond for Canada, and it was a mistake on their part, but they would telegraph at once for the case. We have not as yet received the case, nor can we sell the other goods from the steamer, until the two cases in the public stores have been passed as correct. We have written to the Merchants' Dispatch, but they have not sent us even an answer. Are we not entitled to damages from the Merchants' Dispatch for this delay, and have we not a good claim against them in court?

A. The claim for damages is certainly a good one if the facts are correctly stated.

14. A, B, and C are three transportation companies, composing a through line from Baltimore to the Roanoke River. Goods are shipped and bills lading given by A, stipulating that the companies composing this through line would be only responsible for damages on their respective lines. Goods are damaged while in possession of C, A and B holding each other's and C's receipt in good order. Would an action lie against A or B, C being insolvent?

A. Connecting companies forming a through line have a right thus to limit their responsibility to loss occurring to goods while in their own custody, and the presumption therefore is in this case that the terms of the bill of lading are sufficient to relieve A and B from liability. Except in consequence of an express stipulation, however, A, the first carrier, would continue responsible from the receipt of the goods until their delivery to the place of consignment.

15. A lives in Providence, R. I., and B in Dallas, Texas. B buys 100 bales cotton for A, and ships the cotton to A by the Texas and Pacific Railroad through to Providence, rate guaranteed through at \$1.10 per 100 lbs. The cotton was marked C. B. | O. B draws on A at sight for the cost of the cotton, less the freight, with bill of lading signed by the Texas Pacific Railroad attached to the draft. A pays the draft when presented, and holds the bill of lading for the cotton; 95 bales of the cotton comes along and is delivered to A by the Worcester Railroad in Providence. The freight bills for the 95 bales cotton are presented to A, with expenses on the same at \$1.10 per 100 pounds. A receives the 95 bales and pays the freight bills for the

same to the Worcester Railroad. The other 5 bales are lost. Who is A to look to for the other 5 bales lost?

A. A has a legal claim on the signer of the bill of lading for the cotton, and also upon any connecting line that has acknowledged receipt of the goods.

16. We have a shipment from San Francisco on which freight, according to contract rate on bill of lading, is \$1.75 per 100 pounds, for 1,100\$19.25, and the New York Central Railroad sends us in a bill for the gross overcharge of \$51.57, which we refuse to pay, as these overcharges happen so frequently it is becoming a nuisance, sometimes taking two or three months to refund, and sometimes never refunding at all. The Central refuse to deliver the goods unless we pay \$51.57, and say they will refund the overcharge. We have shown bill of lading with rate inserted to their warehousemen and they refuse to deliver still, and have stored. The goods are sold to arrive. Can we not recover damages?

A. Legally our correspondents have a good case, but the railroad company employ counsel by the year, and are the most arbitrary, exacting, and overbearing corporation of which we have any knowledge in the world. These cases are common, and a suit against such a company so intrenched is not a fair remedy for the gross wrongs which it perpetrates.

17. Is a boat liable as a common carrier when a simple receipt is taken and each package of goods marked with consignee's name and address in case shipper does not take a bill of lading? If yes, would not this manner of shipping place the responsibility where it belongs? A claims that in shipping by the river steamers and sailing vessels, where the custom is not to sign bills of lading, that marine insurance is unnecessary, as the boat is responsible for the cargo; while B claims that it is and that the boat is not responsible.

A. The question here raised is very directly answered in the following sentences from Angell on Carriers, section 88: "The doctrine has been extensively considered in New York, and it is in that State clearly understood to be, that masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port within the State, or beyond sea, at home or abroad, and they are answerable as well by the marine laws as the common law, from all loss not arising from inevitable accident, or such as could not be foreseen or prevented; except so far as the excep-

tion is extended to perils of the sea by the special terms of the contract contained in the charter party or bill of lading." In case, therefore, they carry goods on a mere receipt, without special terms limiting their liability, they can be held to the full measure of responsibility above intimated.

18. Will you please state whether an Express Company is liable for the full value of articles of jewelry, sent without declaration of value, when such article is lost in transportation, or whether the liability is limited to the amount of \$50, as stipulated in the receipt.

A. If the sender accepted the receipt with the full knowledge of the restriction, and there is no negligence on the part of the carrier, the recovery in case of loss will be thus limited.

19. 1. In what respect does the liability of railroads differ from that of ships for losses by fire or otherwise?

2. Suppose an invoice of merchandise is forwarded by a through line from this point to New York, part rail, part water, and is lost at sea, either by fire or by sinking of the vessel, is not the railroad company issuing the bill of lading liable for the loss without insurance of any kind by the consignor?

A. No carrier is responsible for a loss that occurs by the act of God. A fire at sea, or the sinking of a vessel by a storm or other agency beyond human control, excludes liability. But a fire in a car or other conveyance, unless excepted in the bill of lading, does not release the carrier from liability.

20. We shipped by a freight line a case of merchandise which should have reached its destination in a fortnight, but it was not delivered until three months had elapsed. Is not the transportation company obliged to take the goods and pay us, as the customer declines to do so? If not, what remedy have we?

A. The carrier need not take the goods, but he can be compelled to pay whatever damages the shipper suffered by reason of his default in delivering them.

21. Does the stamping upon a bill of lading by an express company of the words, "Value asked and not given," limit the liability of the company to the amount of \$50, as stated in a note at the bottom of the bill of lading? This inquiry relates to shipments of ordinary merchandise only.

A. The courts in some instances have allowed the express companies to profit by such a limitation. We think that it is

against public policy, and that there will come a time when corporations who undertake a public service will be held by that act to have assumed its proper and reasonable liabilities, and not allowed to limit or restrict this by any imposed conditions.

22. Upon whom would the loss fall in the event of a barge or lighter being sunk which had goods belonging to us on board of her, and were being transported from the wharf to a railroad depot for transit?

A. If "Subscribers" themselves employed the lighter, and the latter was in fault, her owner is responsible. If employed by the railroad, the latter must answer. If the loss, however, was the result of an inevitable accident, known as the "act of God," our correspondents will have to bear it themselves. But if a colliding vessel, being at fault, was the cause of the damage, its owners can be made to respond.

23. A vessel on making delivery of her cargo at port of discharge finds some packages short, and agrees to pay for them; is the vessel to pay the invoice price of these packages, irrespective of whether the merchandise has increased or diminished in value since the time of shipment? or is the vessel to pay such an amount as it would cost to replace the missing packages at the time of the delivery of the cargo?

A. The measure of damages is the value of the goods in the market at the place where the carrier promised to deliver them. Angell on Carriers, sec. 488.

24. Is a railroad company responsible for damage by fire, water, or collision to property in transit when not due to the negligence of the company's servants? The transportation companies exempt themselves from liability under these different heads.

A. A carrier is not responsible, or liable, under the circumstances described.

25. Last fall we ordered shipped to this place some cases sheetings, the cost was say 4c. per yard. They were never delivered to us, but we traced them to another house which received and sold them at 7c. per yard.

This is admitted by one of the partners of the other firm and the local agent of the railroad, who said he was sure the other house had the goods.

After eight months had elapsed the railroad company pays us the 4c. per yard cost, with interest, and we acknowledge receipt of cash on account.

1. Have we recourse on the railroad for the difference between cost price and what the goods were sold for here?

2. We owe the railroad a balance on uncollected freight; can it not be set off against our claim?

3. Have we recourse against the house which did receive our goods?

A. Prospective profits form no part of the estimate of damages where goods are lost. The net cash value of the goods at the place where delivery is promised is the measure of recovery. If the house which appropriated the goods took them wrongfully the sufferers may prosecute that firm for the misappropriation and collect all the damages which they can prove as the direct result of such conversion.

26. A steamship company at Liverpool have an agent at Antwerp. This agent, knowing what the goods are and fully describing them in his contract, signs through bills of lading to New York for them, the goods to be shipped by steamer to Liverpool and then trans-shipped on steamer to New York. The shipment does not arrive here, causing great prejudice and loss to consignee. On inquiry the agent of steamship company here says his company refused to take the lot at Liverpool, their steamer being prohibited from carrying goods of that nature. What redress, if any, has consignee for prejudice caused by the non-arrival of goods? And to whom ought he to apply?

A. The agent at Antwerp being fully recognized by the company, and having authority to sign in its behalf, the latter is held by the agreement and liable in damages for a breach of the covenant, unless the shipment of the articles named at Liverpool is prohibited by law. In that case, although neither the agent or the shipper was aware of the prohibition, we think the contract is void. There cannot be a legal contract to perform an illegal act.

27. I bought a ticket on the Brooklyn, Bath & Coney Island Railroad at Greenwood. I paid the regular fare to Coney Island, and upon arriving at Bath I alighted, and upon the arrival of the following train for the Island I handed my ticket to the conductor, who refused to accept it, saying it was only good for a continuous passage. State whether such ticket must be accepted? Would I be compelled to ask for a stop-over check from the conductor, and is he compelled to furnish me with same? Is such ticket good until used? What course could I pursue should I be ejected from the train?

A. The courts have recognized the right of railroad com-

panies to sell tickets "good for this day only" and "good only for a continuous passage." Hence the purchaser of such a ticket is bound by its conditions. If he wishes to stop over at any way station, he must either procure a check or have the leave indorsed on his ticket.

28. The Harlem Railroad Company issue excursion tickets which are good only on the day bought (so it reads on ticket). If I buy one on Saturday and use one coupon, can they refuse to take the other on Monday; or, can they compel me to pay full fare, and if I refuse can they eject me from the car?

A. The courts have decided that where an excursion ticket at less than the regular fare is issued, with this limitation, the company has the right to refuse it on the subsequent day.

29. If I purchase a through ticket from Newark to Philadelphia, and after getting upon a train of five passenger cars and one palace car, learn there are no vacant seats in the passenger cars, but several in the palace car, can I compel the conductor to furnish me with a seat in that car?

A. The passenger cannot "compel" the conductor to give him a seat anywhere. But having contracted for the carriage he is entitled to a seat, and if he demands a seat and one is refused, he can bring an action against the company for damages resulting from their breach of contract.

30. Can one who purchases four railroad tickets claim and hold against other passengers, four seats, though he occupies but one. If one ticket secures one seat, do four tickets give title to four seats?

A. A man may buy four passage tickets, but if this is all he can claim no more room than he can occupy. But in addition to the passage, he may secure seats or compartments in the palace car, and then he is entitled to the space contracted for, whether he occupies it or not, and may prevent any other person from trespassing on his rights.

31. We have a customer at Smithville, Ohio, who has bought some wheat in Chicago, and had it shipped thence to New York by rail. The railroad company gives a bill of lading consigning the grain to us at New York, but containing the clause "to be stopped at Smithville to be cleaned." The question arises in our minds as to how far the railroad company would be responsible to us in case the grain, after having been taken from the cars at Smithville should not be re-

turned to them, or, if an inferior quantity of grain should be substituted?

A. In a case of this kind, the carriers would be more than likely to protect themselves from any liability of the kind referred to by the stipulations of their bill of lading; but aside from that, if the grain were taken from their custody, on the order of the shipper or consignee, for the purpose specified, they could not as carriers be held responsible for its return to them, or for anything that might happen to it while out of their custody.

32. We had goods shipped from New York via Charleston. On arrival we found one case had been damaged by water on board steamer, but the company refuse to pay damages as the goods were not insured. It is evident that the goods were damaged through negligence, as the steamer made a good passage and had no stress of weather. Please advise us if we can recover.

A. A common carrier so far insures the safe delivery of goods that if they are damaged by water simply from want of proper care he must respond. He must show that the damage came by stress of weather or other act of God.

33. What is the law in regard to the responsibility of a steamship on leakage occurring on merchandise shipped in good order. On a recent shipment fully one-third arrived empty, and no one seems to be responsible.

A. If the negligence of the carrier can be established, he can be made to respond in damages. Most of the bills of lading protect the vessel from claims for leakage, and this will bar any claim unless carelessness or mismanagement can be established by evidence.

34. Having shipped a lot of goods to Hawkinsville, Georgia, by a Florida steamship company, they giving through bills of lading to Hawkinsville, Ga., which bills of lading were copied from the receipts given on the pier by the company's agent, the goods are shipped by the agent to Hawkinsville, Florida. We now have a bill presented by our customer for loss of sale of goods and extra freight. Provided the goods are marked Hawkinsville, Ga., can we compel the steamship company to pay the damages? In case the goods are marked Florida, and the company's receipt says Georgia, who is responsible?

A. If a person ships goods on a Florida steamer, under the circumstances narrated, whether rightly or wrongly marked, the

law generally holds him responsible for the error, and he would not be able to recover damages from the line, his own negligence having led to the misadventure.

35. A ships to B 100 bags of coffee, but describes it in the bill of lading as corn, in order to obtain a lower rate of freight. If the shipment or any portion be lost, could the road be compelled to pay for coffee or for corn only? If the road discovers before or after delivery, the true nature of the contents of the bags, can it exact a higher rate of freight than that for which it has already issued a bill of lading? Could it legally refuse to deliver till the higher rate was paid? Could the road maintain an action for fraud against A?

A. The fraud of the shipper we think vitiates the contract, and places the carrier in the same position in regard to the goods as if they had been shipped without any agreement as to their carriage. The higher rate for coffee could therefore be charged, and delivery refused until paid. If the carrier, not having discovered the fraud, should complete the contract according to its terms, he would then, we think, be able to maintain an action against the shipper for the deceit and damage.

36. We order one or more cases (of strictly winter goods) to be shipped from Liverpool, so that we can have them in store by a given time. The vessel arrives in good season, but by some oversight or neglect on part of owners or employees, they are returned to port of departure (Liverpool), and arrive again too late for our sales, necessitating our carrying the same until the next season. Where is our remedy?

A. The vessel must pay all direct damages occasioned by the unwarrantable delay, to be established by evidence when the case is tried.

37. On the 7th day of June charter was made in New York for the ship —, then at Genoa. The said ship was represented by the chartering agents as having been in Genoa some time and ready to proceed to the loading port, and further that she would be at such loading port by the 15th of June, but grace was verbally allowed to the 30th of June. The charter states that "the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, after discharging inward (at Genoa) cargo, proceed to — and there load," etc. The said ship did not report at said — port until some time in August following, insisted upon being loaded upon that charter made 7th June, and its consequences. The said charter provides that the penalty for non performance is estimat-

ed amount of freight. The questions are : If the charter's agents had declined to load the ship would they not have made the charterer liable to the penalty under ordinary circumstances ? But, under the circumstances, is not the ship fully liable for the penalty, in view of the fact that she did not proceed as bound to do ? She did not leave Genoa until about the 6th of August. The charterer having suffered damage and loss in the market value of the material, is he not entitled to recover from the ship and owners ?

A. It appearing that the voyage from Genoa to the port of loading might have been made in eight days, arriving on the 15th of June, a delay until some time in August must be considered such a breach of contract as to enable the charterer to recover the stipulated penalty, if made applicable by the charter to either party ; and if the damage is greater than the penalty, he may even abandon the penal clause and recover actual damages. (Abbot on Shipping, 285.) We think the charterer was also fully discharged from his obligation to load the ship. (Freeman v. Taylor, 8 Bing., 124.)

38. What is the law regulating the right of railroad companies to charge storage on merchandise not removed on the day of its arrival ?

A number of boxes received on Saturday were carted away, part on the same day and the remainder were called for on Monday. A charge of \$4 was imposed and delivery refused until the amount was paid. Is this legal ?

A. A common carrier must give the consignee notice of arrival and a reasonable time for removal before he can store the goods at his expense. If the goods arrived and notice was given in time to remove them on Saturday and the consignee failed to take them away, the carrier could store them at his expense and make a reasonable charge (no more) for that service ; and he has a lien on the goods until the freight and all such charges are paid.

39. A western house orders a package of merchandise to be sent to them by express without further instructions. The package is lost by a railroad accident ; who ought to stand the loss ? The express company disclaim any liability over \$50, according to the receipt given, the value not being declared.

A. The loss will lie between the express company and the buyer. We hope to see the time when no express company or other common carrier will be legally allowed to shirk responsi-

bility on account of exceptions and reservations in the receipt given.

40. In case of loss by fire or water, partial or total, of goods shipped by the Electric line of steamers, plying between New York and Wilmington, Delaware, via Chester, is the ship company responsible?

A. The inquiry is too vague for a definite answer. The circumstances of the loss must first be known, and next the stipulations of the bill of lading, if any, limiting the liability of the company for losses of that character. For such losses in general, however, we may say, carriers by water are responsible unless they have protected themselves by special contract in their bills of lading.

41. Is a steamboat company liable for value of merchandise if lost while in transit, either by accident or carelessness? Is a railroad company equally liable in case of loss? Is the responsibility the same if goods are burned or otherwise destroyed in company's depot at either end of the route, while still in their possession? What is the difference of liability between what is known as an inland line (steamer on river or sound) and an outside or ocean line, in case of loss?

A. Common carriers, whether by land or water, inland or ocean, are responsible for loss or damage of merchandise which they have undertaken to transport, unless the injury is done by means beyond the control of man, known as the "act of God," or by the public enemy; or unless by contract, inserted in the bill of lading or otherwise, or notice brought home to the shipper, they have restricted their common law liability. Their responsibility begins as soon as the goods are in their custody, and is the same whether in warehouse or depot or in transit, except that after arrival at destination, and the carrier's duty as to notice to the consignee has been performed, they are no longer liable except for ordinary care of the property. There is also a national law, by which vessel owners may escape liability for loss beyond the value of their interest in the vessel, and her freight on the voyage during which the loss occurred.

42. On the 31st July a person in the South shipped us 100 bales of cotton, receiving therefor from the steamer a bill of lading. The shipper before attaching draft to bill of lading wrote across it, "Insure this shipment under your policy," and in obedience to these instructions the cotton was insured on the steamer from port to port. On arrival

of steamer we find that one half the cotton was burned on the steamer's dock the day after the bill of lading was signed. As the cotton was only insured on steamer, the insurance company will not recognize the claim. We claim that we followed instructions in insuring as soon as we received the bill of lading, and also that the steamship company is liable to the shipper for the lost cotton, for the reason that they did not use proper diligence in allowing the cotton to remain a day on their dock after their bill of lading had been issued.

A. We presume the insurance company's claim of exemption from liability to be well founded, as the cotton was never on board the vessel, but of this we cannot be sure without having before us the language of the policy. The terms of the bill of lading are also important. If it does not contain the common exception against losses by fire, the steamship company is undoubtedly responsible for the value of the burned cotton. But if loss by fire is excepted in the bill of lading, liability of the company becomes a nice question of law and fact. The weight of authority makes the carrier liable notwithstanding the stipulated exception, if the loss is due to his negligence; but the question whether he was in fact negligent in permitting the cotton to lie over night on the wharf, is one for the jury, and would depend in part upon facts not in our possession; as, for example, the time of day when the cotton was delivered to the ship, the amount of freight in advance of it on the wharf, &c.

43. Among other stipulations contained in the body of a bill of lading as used by the New York and Savannah steamships is the following, viz.: "It is expressly stipulated that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, while on the pier or wharf awaiting shipment, and as soon as delivered from the tackles of the steamer at her port of destination; and if not taken away the same day by him they may (at the option of the steamer's agent) be sent to store, permitted to lay where landed, or returned to the port of shipment, at the expense or risk of the aforesaid owner, shipper or consignee." Under this clause to what extent, if any, is a steamship liable as a common carrier for the loss or damage by fire or robbery after the goods are safely landed on a covered wharf at the usual place of discharge, competent watchmen being always on the wharf to guard the goods? It is not customary in this port specially to notify consignees of the arrival of goods, but a general notice of all the consignees by each steamer is published in the daily papers succeeding the day of arrival. Suppose goods lie on the wharf over Sundays or legal holidays; at whose risk are they? What were the points, circumstances, and decision in a case which we believe

passed through your courts a few years since, where a "Sound" steamer discharged her cargo on a covered pier, her usual place of landing in your city, on 3d of July, and the goods (leather we think) were destroyed by fire on 4th of July, a legal holiday?

A. The case relative to which our correspondent inquires was that of *Ely v. New Haven Steamboat Company*, 53 Barb., 207. The plaintiff had been in the habit of receiving consignments weekly for a long time, by defendant's boats, and a shipment of leather for him arrived at the wharf early in the morning of July 4, and was placed on the pier. No notice was given of its arrival, it was left until the next day, and on the afternoon of the 5th it was destroyed by fire. It was shown that plaintiff's store was closed on the 4th, so that no notice could have been given, and the court said that the responsibility of the steamboat company under these circumstances as a carrier had ceased, and only that of a wharfinger, for actual negligence, remained.

This case, however, is not as decisive as could be wished on the main question in the case described by our correspondent, viz.: Whether actual, and not merely constructive notice to consignee is necessary in order to terminate the carrier's liability as such. The court relied in part on the long course of dealing between the parties, and in part on the fact that the plaintiff's store was closed on the 4th, in order to dispense with notice, and still intimated that the question whether notice was not required properly might have been left to the jury. We cannot find that the Georgia courts have adjudged the point, but the Louisiana Supreme Court (*Kohn & Bordier vs. Packard*, 3 La., 224,) has ruled strongly the other way, deciding that even proof of usage would not discharge the carrier from the necessity of giving actual notice to the consignee of the arrival of his goods, newspaper notice not being sufficient. We will not undertake to predict which way the Georgia courts will decide, though the weight of authority seems to be that actual notice, and an opportunity to take away the goods, must be afforded the consignee, before the carrier's responsibility, as such, will cease. The stipulation in the bill of lading above described might be held to dispense with the second branch of this requirement, but it would have no bearing on the first. The steamboat company remains liable as

warehousemen, for ordinary care of the property, after their liability as carriers ends, and until the property is actually claimed by the consignee.

CHECKS.

CERTIFICATION.

1. I wish to be referred to New York State cases and United States Court cases deciding responsibility of parties to raised check, both before and after certification.

A. The principal New York case on this subject is that of the *Marine National Bank v. The National City Bank*, decided by our Court of Appeals in 1874, and reported in 59 N. Y., 67. It was there held, as stated in the syllabus, that "a bank, by certifying a check in the usual form, simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that these funds will not be withdrawn from the bank by him; it does not warrant the genuineness of the body of the check as to payee or amount." The decision, which contained a miserable pettifogging argument in its support, excited a great deal of criticism, and a motion for re-argument was made, but this was denied without any sufficient reason.

Under this rule it makes no difference, so far as the responsibility of the certifying bank is concerned, whether the alteration is made before or after certification

Daniels says: "Where money is paid by a bank upon a 'raised' or altered check by mistake, the general rule is that it may be recovered back from the party to whom it was paid, as having been paid without consideration, but if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss. The doctrine is clear and is sustained by authority. The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance which inflicts injury upon another party, there is no reason why the bank should not be reimbursed." (*Negotiable Instruments*, vol. 2, p. 573.) The following decisions are cited, in addition to the New York case above: *Espy v. Bank of Cincinnati*, 18 Wall (U. S.), 614; *Redington v. Wood*, 45 Cal., 406; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y., 77;

Bank of Commerce v. Union Bank, 8 Coms., 230; Third National Bank v. Allen, 59 Mo.

2. Does the certification of a check by a bank release the drawer from responsibility? If so, does it make any difference whether the certification is procured by the drawer or the holder of the check?

A. If the drawer of a check gets it certified, and pays it out, he is held for it precisely as if there were no certification upon it. But if the holder presents the check, and instead of drawing the money takes the certification, he thereby releases the drawer from all responsibility in case the bank should fail or suspend before the money is drawn.

3. A has presented to him a draft by the collector of a bank, and having accepted it, received a notice of the day on which it was due, at the foot of which is printed "checks on other banks not received unless certified." On the day when the draft is due A presents his check, certified, in payment of the draft, and receives the draft and bill of lading. A defalcation occurring in the bank on which the check is drawn, when it reaches it in the regular course of clearing, payment is refused, as the bank has suspended payment. Now is A held for the payment of the check, or if not, to whom does the bank holding the check look?

A. The drawer who pays out a certified check is held for it to the close of the next business day, if all the parties are in one city or town; after that, if he has the money to his credit, the payment is at the risk of the receiver.

4. I send a check for \$40 to the bank for certification, duly endorsed. The paying teller refuses to certify it, but says he will pay it if the bearer is identified. Can I compel the bank to certify the check or else pay it without identification?

A. There is no law compelling an indorser to identify himself at a bank, nor is there any legal course by which the holder can compel the bank to certify or pay the check without it. It is a case for mutual concession and accommodation, and for the protection of the community every man ought to be willing to take the pains to identify himself where he is unknown. He demands payment of the bank, and the bank not knowing him refuses payment. He has the check protested if the bank still persists, although when presented by a notary, who vouches for the endorsement, the bank would probably pay. But suppose the check is protested, the holder can then sue, not the bank, but

the drawer of the check, and compel him to pay the same, with the costs of protest. The drawer could then sue the bank for damages consequent on its refusal. The bank would plead that the endorser was unknown and refused to identify himself. The jury in such a case would probably return six cents damages, that would not carry costs. Or if small damages were given the drawer would probably be asked to withdraw his account. The truth is, that it is best for the interests of all that the bank should insist upon identification, but as it has no legal right to demand it, the request should be made of the indorser as a matter of courtesy and mutual protection.

5. Suppose a party deposits in his bank a check certified by another bank after banking hours, and credit received, but the money not demanded until next morning, when payment is refused, can the depositor be held liable?

A. We do not see how a bank can refuse to pay a check it has certified unless it is insolvent. In this or in any other case the depositor would be liable if the check was duly presented the next day for collection.

FORGED, RAISED, AND LOST.

6. A gentleman offers this among the reasons why we should purchase his patent to prevent altering figures upon checks, that in case our check is altered from fifteen dollars to fifteen hundred dollars, we would lose the difference in case of the banks paying it. We say, "No, the bank would lose it."

A. If the check is properly drawn, the drawer cannot lose anything by its subsequent alteration. In this State (N. Y.) our highest court has decided that even the bank which pays the altered check need not lose the extra sum to which the order has been raised, but can recover it of the payee, or the bank through which the payee has collected it. But the drawer is not called upon to suffer.

7. A gives a bank check to the order of B; B indorses it in blank and passes it to C, and C carelessly loses same. Payment of check has been stopped at bank. Bank requests A not to issue a duplicate check. If the check falls into an innocent party's hands and is paid, would A be responsible for check?

A. The check is negotiable, and one who receives it in good faith, without notice and for value, can recover it of the drawer.

8. As a matter of law, barring all custom, suppose John Jones draws a check on his bank payable to his own order, and then indorses it unconditionally, with his signature only, puts said check in his pocket, loses it, it is picked up by some stranger, is presented at the bank on which it is drawn, and paid by said bank, whose loss is it? Is the bank legally liable for not exacting the customary identification of the person presenting the check for payment? Further, is the bank bound by law to pay said check in legal tender without identification of presenter?

A. The bank has nothing to do with the "presenter" if it knows the signature and is satisfied that the check is properly indorsed. John Jones instructs the bank to pay a certain amount to his own order. If he indorses it and the bank knows his signature, the check is then payable without further identification of anybody. If he loses such check and the money is drawn beyond recovery, he loses the money, as the bank can charge the check to his account. This is both law and custom.

9. My name is forged to amount of \$350. I prove that all checks over \$75 are made "to order." Is there any lack of care on my part in the matter, and am I in any sense legally responsible for loss to the bank?

A. We do not see how a man can be held responsible for a forged check with which he has no concern, whether he proves the point stated or not. If a man has, by gross negligence, aided in the issue of a forged check, he may be liable for that as for any other negligence by which his neighbor suffers.

10. Our traveller collected a bill and the check was made to our order. He forged an indorsement and obtained the amount from the banking house. Can we recover from the latter?

A. This has been legally decided. If the check was paid by the drawee our correspondent can collect the money. The better way, however, is for the drawer of the check to refuse to have it charged to his account and to issue a new check for the same amount. If the drawer declines to do this, our correspondent can sue for his bill.

11. The owner of a lost check requests the drawees to stop payment of it, saying: "My name, if indorsed on the check, is forged." The check is presented for payment by a bank and is, apparently, properly indorsed. Have the drawees the right to refuse payment, no instructions to that effect having been given by the drawers?

A. In England the drawee of a check is protected by act of Parliament in paying it to any person who presents it, if it appears to be properly indorsed, although that indorsement may be a forgery, but in this country the drawee must see that the indorsement is genuine, and he pays it at his own peril. If the drawees of the above check pay it, and the indorsement of the payee is forged, they will simply lose the money, as they cannot charge it to the drawer's account. They need not, therefore, wait for instructions, but have the right to protect themselves.

12. Who suffers the loss in the following case: A B gives his check payable to C D, or bearer, the usual way checks are drawn, for \$100. C D loses the check and it gets in the hands of another party, for value. C D gives notice to the drawer that he has lost the check, and requests him to give notice to the bank on which it is drawn not to pay it, which is done before the check is presented for payment.

A. A B is responsible to a bona fide holder of the check for its value, although he has stopped its payment at the bank, and C D must lose it, unless the "other party" can recover the money of the finder who passed it to him.

13. About a month ago a servant girl lost a check for about \$40 that a gentleman had given her for her wages. She called on the gentleman, and he went to the bank and had the payment stopped. She has called on him several times since. He says the check has not been presented to the bank, but he will not give her the money, neither will he give her any encouragement. What is the best course for her to take? Is it necessary to advertise the loss of the check in the papers, etc.?

A. If the check was payable to bearer it is negotiable as it stands, and the girl must give bonds in two good sureties to hold the drawer harmless before she can lawfully demand either the money or a new check. If she has friends who will do this for her, the drawer of the check will doubtless advance the money; in fact the law will compel him to do it. If she cannot obtain such sureties she must wait with patience until the employer can feel certain that the check will not turn up against him.

14. A bank in this State, to whom we sent a note for collection, collected the amount from the drawer of the note, and the check which they sent us in settlement was lost in the mails. The bank refused to issue a duplicate check to us without being indemnified against loss, by reason of the possibility of the original check being paid

at some future time. Are we obligated to give the bank such a bond?

A. Yes, our correspondent must give a bond with two sureties (if demanded) before he can exact a duplicate check.

15. You decided that a drawer of an original and a duplicate check may, under certain conditions, be held liable for the payment of both. I think you decided some time ago that the drawer could protect himself by putting on the one, "duplicate unpaid," and on the other, "original unpaid," thus giving notice to the purchaser of either that the other is one? Am I correct?

A. Our correspondent is correct; if the drawer issues his checks in original and duplicate, with a plain statement that one being paid the other shall stand void, he can protect himself, but each of the issues must have this condition clearly included in the order; unfortunately in the case we were considering, the "original" was issued with no reference to any "duplicate," and the holder of it in good faith for value can therefore claim the amount from the drawer, although a duplicate has been issued and paid.

16. A draws check to the order of B for \$100 and mails the same to B, who indorses the check and deposits it with bank for collection. The bank forwards same for collection, and the check is alleged to be destroyed or lost. Would A be safe to draw a duplicate check for B without a bond of indemnity, three months having elapsed since original check was drawn?

A. The lapse of time would render it comparatively safe to issue a duplicate check; but the bank which forwarded the check for collection, and is responsible for its loss, ought to write a letter to the drawer agreeing to protect him from loss in the transaction in case he forwards the duplicate.

17. Seeing an account of the mail robbers and their taking letters from the mail bags with checks inclosed by New York firms to out-of-town correspondents, in settlement of accounts, forging the signature of the firm drawing the check on the back of the check, and thus seeming to guaranty the indorsement as correct, presenting this to the banks and obtaining the money: we want to know, in such a case, who is responsible for the money paid out by the bank? 2d. We are in the habit, when requested by Western concerns, to remit to them balances due them by our check inclosed in a letter to them. In case such a check should come by unfair means into another party's hands and eventually be paid by our bank (we not knowing anything in regard to it), would not we be relieved from any responsibility in regard to it by the fact of the request from the Western party to remit check to him?

A. Where a check is made payable to the order of a third party, and his indorsement is forged, the bank which pays it must stand the loss. In case a person is requested to remit his check in payment of an account and it is lost in the mail, the risk as between the two falls upon the correspondent who asks for it; but if it is drawn to order, and the money paid on a forged indorsement, the loss falls on the bank, which cannot, in such a case, charge it to the drawer's account.

18. Can a check upon a bank, payment of which is refused because of irregularity in indorsement, be legally protested? To illustrate, the check is drawn to order of John R. Jones, and is indorsed J. Jones. The bank has no means of knowing that John R. Jones and J. Jones are one and the same person; and the holder of the check refuses to guaranty indorsement.

A. The check may be "protested" if not indorsed at all provided the holder chooses to go through that form, but no costs for protest can be collected of the drawer, and no action thereon be taken against the bank. Moreover, if any damage results to the drawer directly from such protest, he may recover it of the party responsible, as payment of the check duly indorsed had not been demanded and refused. The bank would be fully justified in refusing the unguaranteed indorsement of J. Jones, on a check payable to the order of John R. Jones.

INDORSEMENT.

19. On the first day of November A gives B check for \$500, B indorses the check and pays it to C, C holds the check until December 1st. In the meantime A makes an assignment, and C then sends the check to the bank and the check is protested and sent back to C. Now does C lose the amount of the check, or is B obliged to take check back from C?

A. The indorsement of B only binds him to make the check good one full day after C has had an opportunity to present it. If it was drawn on a bank in the same place, and C did not present it the next day (at least) after he received it, he has no recourse to B, but must look wholly to A for his pay.

20. Does the guaranty of indorsement on the back of a check increase in any way the liability of the last indorser from whom I receive it? and if not, why do most of the banks require it, both from banks and individuals?

A. Some persons have an idea that an indorser only guaranties the genuineness of the person's signature and not to its entire extent the sufficiency of the indorsement; hence the request for a guaranty.

21. Is not B's indorsement on A's check a legal receipt against all demands?

A. The indorsement and use of a check containing such interlineations impose no corresponding obligations upon the payee. The words are mere surplusage.

22. If I deposit a check drawn to the order of another party, and indorsed, and it is "not good" when it arrives at the bank on which it is drawn, how long will the indorser be liable?

A. If the check is drawn on a bank in the same place the indorser is held all the day on which he passes it to the depositor and all the next day. If on a bank in another city, and it is sent for collection within the time specified, and due notice given of its non-payment, the indorser is held. If there is a greater delay in presenting it than the time specified, the indorser is not liable.

23. A check to the order of John Smith is lost and falls into the hands of a second party of the same name, who, knowing the check is not intended for him, indorses it and secures the money thereon. Was he guilty of forgery, and if not, on what charge could he be prosecuted?

A. The bank can be compelled to make restitution of the money, just such a case having been legally decided against the American Exchange Bank, which supposed it had assured itself of the identity of the indorser. As for John Smith, his offense is constructive larceny, for which he can be punished if caught.

24. A B draws a check on one of your city banks for \$10,000 in favor of his brother, C D; C D indorses the check back to A B; A B then indorses the check over to E F. Upon presentation at the bank the check is found to be worthless. A B is insolvent when the check is presented, but C D is good for the amount. Can E F recover from C D as indorser, E F being innocent purchasers? The question is one of local interest, and I wish to know if the transfer of the check from C D to A B, completing the transaction between the drawer and the first indorser, does not release C D from subsequent liability; in other words, does not the indorsement of C D back to A B complete the transaction?

A. A prior indorser to whom the check comes back has ordinarily no claim on a subsequent indorser who has possession between the incidents, nor would the drawer himself have such a claim. But E F, in the case described, would have a recourse to all the previous names, provided there was no break in the responsibility by lapse of time and want of due diligence in collection. If the check was good when C D indorsed it back, and payment was subsequently refused because of a day of more than 24 hours in the demand at the bank, C D would not be held, no matter to whom he indorsed it.

25. We took a check of a customer, drawn by another party to his order, which was returned to us protested. "Not sufficient funds." The maker of the check lives in Camden, N. J., but does business here, and drew the check on a Camden, N. J., bank. The indorser will not pay, and on inquiry we find that the drawer has had but one dollar on deposit for over six months, the bank notifying him it would not receive further deposits from him, and telling us they have thrown out probably fifty checks of his within that time. Can we sustain criminal action against him for issuing a worthless check, and should such action be taken here or in New Jersey?

A. In the first place if due diligence was used in collecting the check, the indorser must pay it if he is solvent, or the debt can be collected of him at any rate. Sending a worthless check does not discharge the "customer" from his obligation, nor settle his bill.

In the next place we think the circumstances will warrant the arrest of the maker by the person to whom the check was given, provided the former obtained any property through its issue, since the refusal of the bank to receive any further deposits from him shows that he knew the check was worthless.

The better way in this case would be to arrest him here.

26. State if the holder of a check for any amount drawn as follows, "pay to the order of bearer" (latter word filled in with ink), is compelled by any legal decision to indorse his name on back of same in response to a demand by the bank on which it is drawn, before he can obtain the money. State the law bearing on same.

A. Some bank letters have held that a check in which the blank left for a name is filled up with the word "bearer," so that it reads as if payable "to the order of *bearer*," must be indorsed

by whoever shall be the bearer. But the courts have decided (*Willeys v. Phoenix Bank*, 2 Duer, 121), that where the blank is filled up with a fictitious name, or to the order of "bills payable" or the like, that the check is precisely the same as if it read "pay to the bearer," and requires no indorsement to be legally demanded, and protested if payment is requested.

27. Is the indorsement on a check, "Pay the within to N. N. N.," proper and correct?

A. The indorsement is both proper and correct. It would be just as effective, however, if the words "the within" were omitted, and if the further negotiability of the paper is essential. "Pay to the order of N. N. N." is better.

28. A check is indorsed in this way:

Pay with check to our order.

JOHN JONES & Co.,

and is presented at a banking-house for payment. Is that a limited indorsement? Have the indorsers the right to dictate the way in which the check shall be paid, and if their signature is known to the drawees, and they pay the check in cash, and the messenger absconds, can they be made to pay again?

A. The form quoted above is not a *limited*, but a *restrictive* indorsement. The drawee has no right to pay except in a check to the order of the indorser, but he may decline to pay altogether on the ground that this is not a full indorsement. If he pays in any other way it is at his own risk.

MISCELLANEOUS.

29. I am the possessor of a note due at a bank. I keep an account with the bank, and send my check to retire the note. The check is filled up thus: "Pay for retiring note due December 29, 1878, or order." Suppose the check falls into improper hands and is presented at the bank, would the bank treat it as payable to bearer in the absence of a name "to order"?

A. The courts have treated memoranda in the body of a check with so much indifference that it would not be safe to say that this order could only be used for the purpose specified. "Pay for the purpose of exchange" has been held as payable to any bearer. If the drawer of the check wishes to avoid all other use of his check he can guard it better, "Pay only on the order of the bank to cancel my note of this amount due December 29," would be a better form.

30. If a check is drawn on a bank, and written in the body for \$1,500, but in figures on the corner of the check plainly marked \$1,005, is a bank justified in paying the \$1,500 as designated in the body of the check. Our bankers here contend that they are right in paying a check in accordance with what is written in the body, irrespective of the figures on the corner. They contend this is in accordance with custom, and their lawyer is of the opinion that the courts would sustain this position, though the amount intended to be drawn for was only \$1,005. Is it not the duty of the bank in a case of this sort to tender only the lesser amount, and if payment of the larger amount is insisted upon by payee, should not the bank refer the matter back to the drawers if circumstances will permit thus doing so? Otherwise only pay the larger amount upon being indemnified. To us, looking at it in its common sense view, it would seem that the courts would hold a bank to such a rule, but as there is a difference of opinion, we would thank you to give us your opinion, sustained if you can, by any legal decisions?

A. This question has been met and decided in a multitude of cases. "The sum payable is usually specified in figures in the upper or lower left hand corner of the instrument, as well as in writing in the body of it. Where a difference appears between the words and figures, evidence cannot be received to explain it; but the words in the body of the paper must control. Daniel on Neg. In., vol. 1, page 66; Payne v. Clark, 19 Mo., 152; Riley v. Dickens, 19 Ill., 30; Mears v. Graham, 8 Blackf., 144; Saunderson v. Piper, 5 Bing., N. C., 425; Smith v. Smith, 1 R. I., 398 (where it was \$175.94 in figures, and *three hundred and seventy-five* 94-100 in writing); 1 Parsons N. & B., 28. Daniel on Neg. In., vol. 2, page 509, 'Where the marginal figures differ from the written words, the words should be attended to, and not the figures.'"

31. A check is drawn on a bank made payable to bearer. The payee hands the check over to a third party; the third party indorses the check to the order of a fourth party. When the fourth party presents the check at the bank, is the latter bound to notice the indorsements at all, or could it be held for loss, unless the check had been made to order on the face, and should it require identification?

A. Where a check is payable on its face to bearer, the drawee is not bound to take notice that it has been indorsed with a condition. But where his attention is drawn to such an indorsement the drawee may reasonably demand the identification of the holder, and ordinary care for the interests of others requires that he should do it.

32. A draws a check to the order of B for \$20, but the check should have been drawn for \$30. Now if A writes across the face of the check that it is for \$30, and alters the figures, is it good and can B draw the \$30?

A. The check would be considered by any of our banks a sufficient voucher for \$30, and would be paid to the order of B if properly indorsed.

33. You say in reply to an inquiry regarding the omission of the date of a check, "The receiver may supply the date, but it is wholly unnecessary, as it is just as negotiable or payable without it." Morse, in defining the requisites of a check, says: "It must be dated, for a check is not payable until dated."

A. We had before us "Morse on Banking," page 238, which states that "it would seem, that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable," when we made our former answer. It may "seem" so to Mr. Morse, but there is no authority whatever for it in law. Daniel on Neg. Ins., vol. 2, page 508, quotes this from Morse, and disputes it, saying: "There is no adjudication to this effect, and while it may be that a bank would be warranted in refusing to pay an undated check (and this is doubtful), it would not be unreasonable for it to assume a contemporaneous date and to pay it accordingly." It is true that there has been no adjudication of this exact question, but the case of *De la Courtier v. Bellamy*, 2 Shower R., 422, where no date was set forth in the declaration of a bill, and the court held that it was immaterial, and they would assume the date on which the declaration stated that the bill was drawn as the true date of the bill, shows that a date is unnecessary to the validity or negotiability of such a document, unless it is expressly payable at a given time from date. Bell Com., Chitty, Bayley, and all, agree that an inland bill of exchange is good without date. Story says "there should be a date, but it is not indispensable," and he adds that if to ascertain the interest "it should become necessary to be inquired into, it may be ascertained by evidence, and the date will be computed from the day it was actually made or issued." The holder of an undated check may supply the date, or the bank may pay it without a date, having the right to assume that the

date is past or present, either of which would make the payment proper and lawful.

34. Is a bank teller justified in refusing to pay a check made, dated, and signed on Sunday?

A. There is no good reason why a bank should refuse to pay a check dated on Sunday.

35. Is a check dated ahead good in case the signer thereof dies previous to the date of the check?

A. A check dated ahead is just as good after the drawer is dead as a check dated yesterday. Neither of them is then collectible at the bank, and each is our evidence of debt against the estate and nothing more.

36. We owe a party in Augusta, Ga., \$500. He instructs us to remit him in New York exchange, which we do by sending a national bank check on a national bank in New York city. Does our responsibility in the matter cease here? Should the bank fail before the check is paid could we be held responsible for the payment of the check?

A. Our correspondent is responsible until the Georgia creditor has opportunity to collect the check by due course of mail, unless the instructions to remit are so worded that the remittance, if made in good faith, is at the risk of the receiver.

37. Please tell us the difference, if any, between drafts and checks as used in commercial intercourse?

A. A check was originally defined to be "a draft or order upon a bank or banking-house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a person therein named, or to him or his order, or to bearer, and payable instantly on demand." The term "draft" may be used to describe a check, but it is generally applied to an inland bill of exchange. A check is a species of bill, but has some peculiarities, as above described, not applicable to an ordinary bill of exchange. There are many documents concerning which the authorities declare that the holder of one may, at his option, treat it either as a bill of exchange or as a check. Thus a check dated ahead was once classed as a bill of exchange, but has finally come to be known as a post-dated check, and a memorandum check has been legally recognized as such.

38. A is owing B a bill, in payment of which a post-dated check is accepted by a clerk of B, each party doing business at the same bank. B, who does not sanction the act of his clerk, demands payment of the check from the bank. Has the bank any right to negotiate that check, charging A's account, thus nullifying an agreement which had been entered into in good faith? And is not the acceptance of post-dated checks an implied agreement to wait until their maturity, which would be broken by an effort to negotiate?

A. The check, whoever holds it, is not good against A's account until the day of its date is reached, but there is nothing in law or equity to prevent B from negotiating it as soon as he receives it, if he can find any one to give him the money for it. If the bank takes it, and gives B credit for the money, it cannot charge the money to A until the day of the date.

39. A person draws a check on his bank to the order of another as a loan to him, who immediately absconds, and the bank is notified not to pay. Is he liable to any holder of said check any time after?

A. The drawer of the check is responsible for the money to any indorsee who received it for value in good faith, and if solvent he can be compelled to pay it.

40. A gives B his check payable to Cash. B loses the check on Sunday and notifies A immediately. The next day A sends written notice to the bank to stop payment. Three months later A has his book balanced and finds that the check has been paid two weeks previously. Can B recover the amount from A? Can A hold the bank responsible?

A. A had the right to stop payment of the check at the bank, but was liable for it to an innocent holder for value. In this case it looks as if the bank had not used due diligence in paying it after the order to stop it, unless there was some alteration of the date or other deception. If so, the bank must lose it. If not, then the loss falls upon B, whose carelessness caused the difficulty.

41. A orders a bill of goods from B which amounts to \$200, for which he tenders a \$300 check, which is accepted by B, who gives his check in return as change for \$100, payable to bearer or order. After A leaves the store his check proves to be a forgery. Cannot B stop the payment of his \$100 check, and finally cannot the drawer of a check always stop payment of the same, if necessary? And if so, what becomes of the check in the meantime? Say the check is payable to bearer, the holder presents it to the paying teller and has it in

his hand when the drawer calls and says "Don't pay," what does the bank do in such a case?

A. The drawer of a check can always countermand its payment at any time, unless the bank has certified it. But such stoppage does not release the drawer. In the above case the bank would pay at its peril, and any institution would of course refuse to cash the check thus stopped by the drawer. But the holder, if he has taken the check in good faith for value, can sue the drawer and recover the money. We suppose that the person presenting the above \$100 check at the bank had taken it of the rogue and given value for it. In that case, while the drawer can stop its payment at bank, he must reimburse the holder. It is not an obligation against the bank, but it is good against the drawer, who must take it up.

42. Is it an indictable offence to give a check upon a bank where one has no funds? Is it not the presumption of the law that the maker of the check intends to have funds to meet it before the bank closes?

A. There is no presumption of fraud where one who has an account in a bank issues a check upon it, although he has not a sufficient amount on deposit to meet it. This is done by very many respectable houses every business day in the year, the account being made good for all outstanding checks before the bank closes.

43. A keeps an account in the D—— bank, and draws a check in favor of B for \$50. B presents check but there is not enough to the credit of A to pay it. B then leaves the check with bank to collect when A has funds enough to pay same. A afterward has enough funds to his credit to pay the check, but forbids the cashier to pay on the check to B more than \$40. But the cashier says he cannot receive the \$40 in payment of check to B. A then draws out of the bank all funds to his credit, and becomes insolvent. Would or not the bank be responsible to B for the amount of the check?

A. The drawer of a check has the right so far as the bank is concerned to stop the payment, and the bank is not responsible for refusing to cash it after receiving such an order.

44. Is a check drawn by a party to his own order, and so indorsed, payable to bearer?

A. A check payable to the order of the drawer is not a check payable to bearer. It is negotiable and to be paid when properly indorsed ; but, if the indorsement is a forgery, the drawee is not bound by it, and the bank may recover of the payee if it can find him. The bank is bound to know the signature of the drawer, but does not guaranty the indorsement, although it may purport to be by the same hand.

45. A sends check to B in payment of account on December 5, 1878, dating same January 7, 1879, undoubtedly with the intention of dating it ahead, but without any special notice in remittance. A deposits check which is forwarded at once for collection. The bank to which it is forwarded fails to present same, as it supposes the check is dated ahead. On January 11, 1879, B receives notice that the check is protested for non-payment. Who is holden for the amount ?

A. The check was dated ahead if our correspondent has made no mistake in his dates, and as due diligence appears to have been used in the collection, no one is "holden" to the payee but the drawer. The payee who deposited it must reimburse the bank if he has drawn against it.

46. Is it any safeguard *now* to have printed on checks "in current funds ?"

A. In a promissory note likely to run for several years, the words "payable in current funds" might save the drawer the purchase of coin at a premium ; but in a check for whose payment in legal tender the drawer would not be responsible, if he had the money to his credit for more than one full day beyond the day on which the payee received it, the expression has no practical importance.

47. A gives B common bank check but written "eight days after date," etc. B presents check at the expiration of eight days, but the cashier refuses payment, claiming three days grace. Would B be justified in protesting check ?

A. This is regulated not by custom, but by law. By the supplementary act of 1875, such a check as above described is payable on the day specified without grace. If the bank refused payment the holder may protest.

48. Is a check bearing a future date received in payment for goods sold and delivered negotiable, the same as a note, or in what way is its legal status different ?

A. A check dated as drawn and payable at a future day has been held by many authorities to be a bill of exchange; but a post-dated check is now recognized as a proper negotiable instrument if payable to order or bearer, and is due when the date is reached if that is not a holiday; if it is, then it is due on the next secular day. Daniels on Negotiable Instruments, vol. 2, sec. 1578. There is all the difference between it and a promissory note which there is between an ordinary check and such a promise.

49. We frequently receive on deposit checks drawn in the following manner: — National Bank, through New York clearing house, pay to — or order, — dollars.

Can such a check be presented at its counter for payment?

If payment be refused, can such a check be protested for non-payment?

Is it right for a bank to issue such checks to its customers? I understand it is the ordinary check of the bank above mentioned.

A. The check must pass through the clearing house for payment to comply with the terms of the order.

The drawer or indorser cannot be charged with the cost of protest unless the check passes through the clearing house.

We see no special objection to this form of check if the drawer and payee are content with it.

50. Suppose a check is given, and the person puts his name on the back of the check and draws the money at a bank, and a day or two after the check is paid the bank finds out that the persons who gave the check have failed, could the bank go to the man who received the money and make him return it?

A. If the money was obtained of the bank on which the check was drawn, the bank cannot come back on the payee for the money in any such case. If the drawer has failed and the account is overdrawn, the bank must lose it.

In case of a payment where the debtor is afterward thrown into bankruptcy, the creditor who was preferred in view of such failure is sometimes obliged to refund the money.

51. A debtor in the country sent me some days ago another party's check (as remittance), made to my order, the debtor's name not appearing upon the check, but his accompanying letter advised of its inclosure, what it was for and the amount. Upon examination I found

the check incomplete, that is, it was not wholly filled up, the amount (say \$90) was entered in figures on the end of the check, in the usual place, but the word "ninety" had not been written in, the space intended for that was wholly blank, and as the omission was an evident oversight, the figures (\$90) being plainly marked, and my letter of advice from the debtor stating the inclosed check was for that amount. I wrote the word "ninety" in the check and disposed of it as usual. Now did I do wrong under the circumstances? and should I have returned the check for correction and not made it myself?

A. There are abundant legal decisions justifying the filling up of an accidental blank in a check or promissory note, in accordance with the facts. This is different from *altering* a check. If a check by mistake is drawn for fifty dollars when it should be ninety, the receiver may not change it. But if no amount is specified either in figures or writing, and ninety dollars was intended, the receiver and payee may supply both the figures and writing.

52. For what length of time can we lawfully hold a check, leaving the maker responsible for its value? We have a check made this day which we intend to deposit in three days, and I contend that the liability for the same on the part of the drawer will cease if the check is held longer than two days.

A. The liability of the drawer for a check does not cease after two days, or any other short limit of time. But where the drawee of a check is in the place of its issue, the receiver is bound to present it for payment on the day he receives it, or the next day at furthest, to hold the drawer liable for the solvency of the drawee. In plain terms, if the bank on which the check is drawn should fail on the day the holder receives it, or on all the next day, the drawer must make it good; but if it is held longer, and the drawer has the money on deposit ready to meet it, the solvency of the bank is at the risk of the holder. If the bank remains solvent however, the drawer is held for any reasonable length of time to keep the account good, so that the check can be paid whenever presented.

53. What is the liability of a giver of a check protested under the following circumstances? A gives B a check on Friday at 4 P. M. On the following Monday at 10.15 o'clock the bank suspends payment. B deposits his check on Saturday at 11 o'clock; the suspended bank pays all day Saturday. The check was made payable to the order of B, not to bearer, and B's bank returns check from clearing house on Monday morning protested.

A. If all the parties and banks were in the same place, the drawer of the check is held to make it good all day Friday and Saturday. After that, if the drawer had the money to his credit, it is held at the risk of the holder. In the case above cited the holder must wait on the bank for his payment.

54. A traveling agent of ours took a check of a customer with the indorsement of the latter, on which was also a former indorsement, the check having been dated several days previous. The check was sent to us and presented for payment. There were no funds, nor had there been for several days. The bank advised the holding of it a few days, thinking funds might be forwarded. We then wrote to the parties of whom we received the check, stating the fact. At the end of 30 days our agent was there again, when the parties claimed they had not received our letter and would not cash the check.

A. As the check appears to have been given to the agent to be remitted, if our correspondent had presented it at once, and on refusal of payment notified his customer, the latter would have been held on his indorsement. The delay there in the hope that "funds might be forwarded" deprives the writer of any legal claim on the indorser, *provided* (and this is important) he could have saved the money in any possible way by an earlier notice. But if it can be shown that the check was not good when the agent took it, we think that customer may (under legal pressure) be compelled to pay his debt in something better. Suit should be brought on the original debt, and if the customer plead the check as payment, the reply that the check was worthless, if established by proof, will enable, we think, our correspondent to recover.

CITY AUTHORITIES.

1. Can you inform me briefly what is the nature and extent of the security of municipal bonds legally issued and signed by the city authority? I contend that they are a lien not only upon the corporate property, such as public buildings, parks, docks, franchises, etc., but also upon the real estate owned within the city limits, and that in default of interest the bondholders can, if necessary, levy upon this private property through legal measures, by tax or otherwise, to an amount sufficient to repay them. This view is contradicted that municipal bonds are simply a lien upon the city property owned by the city, and in no way can private property of the citizens be made to pay public debts.

A. It is the theory of responsibility that all the taxable property in a municipality can be compelled, to the extent of its salable value, to contribute to the liability of the corporation. When a judgment is entered and execution is issued, the first process is to levy upon the available movables belonging to the municipality. After that the proper authorities are subject to the order of the court, which may require them to levy a tax to satisfy the judgment. This remedy has not, thus far, been found as perfect in practice as in theory. The officials have resigned or been contumacious, or have fled, and have tried all sorts of dodges and subterfuges to evade the responsibility, but the power exists, and can only be evaded or resisted.

2. What are the duties that devolve upon the Health Commission and what are the rights of city residents in the following connection:

The commission assumes the right to enter any dwelling in order to determine whether the drains are in order, and so far as tenement houses are concerned, exercise that right. Are they bound by law to make the same examination of the better class of houses when requested so to do by the owners or occupants. Most people who are able are willing to incur any reasonable expense, if thereby they can be assured of a healthful house, but as a rule they are without personal knowledge, and having no confidence in the knowledge of a plumber, desire the advice of a reliable expert.

A. The Health Board are distinctly authorized by law to visit and make inspection of all "Ferry boats, manufactories, tenement houses, hotels and boarding houses," as well as "Edifices suspected of and charged with being unsafe," and they have power to enforce such measures as may be necessary. They are not charged with the duty of inspecting private houses at the call of owners or occupants, however, upon a roving commission to ascertain whether or no they are constructed in such a manner as to be healthful. This is thought we suppose to be sufficiently regulated by the requirements of the building laws. We think very likely that an Inspector or expert would be sent on the invitation of a respectable householder who had reason to suspect the healthfulness of his dwelling.

3. Is the State or Federal Government responsible in damages for the acts of rioters? Did the State of New York reimburse losses occasioned by the draft riots in New York?

A. Neither the State nor the General Government can be sued for any private purpose. The Local Government is the one held responsible. In the draft riots New York city paid about one and a half million dollars indemnity to the sufferers.

COIN, WEIGHTS AND MEASURES.

1. Can an American citizen living in the United States buy silver bullion and coin Peruvian dollars of the same standard as the dollar of that country, to be used outside of the jurisdiction of both countries, without making himself liable to criminal prosecution in the United States?

A. The manufacture of such coin in this country is forbidden by section 5,461 of the Revised Statutes of the United States, under penalty of a fine not to exceed \$3,000, and imprisonment for not more than five years.

2. "Every person who fraudulently by any act, way or means, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens the gold or silver coin." Is the *doing* simply of any of the above things to a piece of coin in one's possession and belonging to him, a fraudulent act and therefore punishable according to the provisions of the statute, or does it become fraud when he attempts, after having done them or any of them, to pass the coin as money?

A. An owner of coin may divert one or more pieces to other uses, and for such a purpose alter or deface them at pleasure; but he has no right under the law to mutilate a coin even for a temporary amusement, and leave it subject or liable to be placed again in the channels of circulation.

3. Please inform me of the denominations of the weights and moneys standard in China, and their proportion to American or English weights and measures?

A. In China as to weight 16 taels equal one catty or pound, which is in our standard $1\frac{1}{4}$ pounds avoirdupois; 100 catties equal one picul or tam, which is $133\frac{1}{4}$ pounds. In money, *tsien* (cash) is the only native coin now current. In the terms of account 1,000 *cash* are equal to 10 *mace*, or 100 *candareens*, or one *tael*. At Shanghae one tael is about \$1.39 in Mexican silver dollars.

4. Will you please state the exact proportion of American and French weight? How many American pounds and fractions of a pound are for instance 100 kilos. wheat?

The New York Custom House assumes 100 kilos. as 221 lbs.; but this is, I understand, only approximate and for custom house purposes.

A. The kilogramme is 2.20475 lbs. avoirdupois, and 100 kilos. therefore are 220.475 lbs., instead of 221 lbs.

5. What should a ton weigh? I purchased a ton of hay and received but 2000 pounds, and claimed 2240 pounds, the party selling saying he never heard of anything being sold at the latter figure as a ton.

A. The custom of retailing hay is 2,000 pounds to the ton, and in this State (N. Y.) this is a legal ton.

COLLATERALS.

(SEE ALSO LOANS.)

1. I held two notes drawn by a party who has made an assignment. The first note is secured by collaterals so depreciated they will not pay the face of note; the second note is secured by collaterals which will overpay. Now, it is asserted that the collaterals on the second note having been put up for a specific purpose cannot be held for the loss on the first note, and are liable to attachment by assignee. In other words that I cannot bunch my collaterals.

A. The United States District Court for the Eastern Division of Virginia, *In re Peebles, &c.*, 13 B. R., 149, remarked: "The Roman law gave a lien upon the chattels pledged for one debt, for the satisfaction of all the debts held by the pledgee against the pledgor. But the rule of the common law of England and of this country is different." Again: "There is no lien at common law which gives the holder of pledged personal property a lien upon it, beyond the especial object for which it was pledged," except there is an express or implied contract, from the usage of trade the manner of dealing between the parties, &c. It is also said, on the authority of *Hepburn v. Snyder*, 3 Barr., 72, that liens are not favored in Pennsylvania. Our opinion, accordingly, is that no lien would be allowed except in accordance with the contract, express or implied, under which the collaterals were pledged.

2. A borrows from B, giving as collateral security certain warrants or bonds. He afterwards gives C a written transfer to a part of those warrants subject to B's lien. C presents same to B, asking him to accept same. He refuses. A afterward makes payment to B of

amount borrowed and demands his collaterals, which B delivers. Is B in any way responsible to C for his claim against A?

A. A pledgor may subsequently assign his property in the thing pledged, and the assignee will then have the same rights as the pledgor. If this assignment from A to C was legally made, and B had notice of it, he may have rendered himself liable to C by delivering to A the property thus assigned, the latter having divested himself of the title.

3. A loans money to B and receives as security stock collaterals with a margin of 25 per cent. If B fails can A keep the collaterals or can the creditors claim them?

A. The creditors can pay off the loan to A, and thus recover the collaterals for the use of B's estate.

4. If A borrows money of B, depositing with him United States Bonds as collateral, and said bonds are stolen or destroyed while in the custody of B, as the law now stands, the loss, I believe falls on A, unless want of due diligence can be proved against B. Suppose now that instead of the above B borrows United States bonds of A, depositing with him a collateral in money, the equivalent of the bonds at market value, if the bonds are lost as before, upon whom does the loss fall?

A. The only difference in the two cases consists in the amount of care required of B, as bailee. In the first instance specified he is "bound only to ordinary care, and is liable only for ordinary neglect." (Parsons on Contracts, Vol. 1, 109.) In the second, according to the same authority, he is "bound to great care, and liable for slight negligence" (ib. 108). The omission of the most exact and scrupulous caution in this case is regarded by the law as a culpable neglect (*Scranton v. Baxter* 4 Sandf, 5). But without fault on the part of the hirer of chattels, in the absence of an agreement, he is not bound to make good their loss (*Hyland v. Paul*, 33 Barb., 241).

If however, the object of putting the transaction in the form stated is merely to increase the bailee's liability for negligence, and A is the real borrower, the better way would be for the parties to come to an agreement with reference to their respective liabilities. In case of a loss, and a suit, the courts would be apt to inquire into the real nature of the bargain, and apply the appropriate rule, without reference to the disguised, if such it is.

5. Does a right exist to sell several lots of merchandise held as collateral security for notes overdue and margin not deemed sufficient? Can the holder sell as he thinks best, when or how, without consultation with the owner of the goods, and then look to him for any balance? Does the law prescribe any mode or form or in any way give owners a right over them, or protection?

A. The banks here use a form of note or contract which authorizes prompt conversion by the bailee on default of the borrower, but even with this there is danger, in our judgment, of expensive litigation if the collaterals are hastily sacrificed. The usual method is to give notice to the borrower, and then if the collaterals are not redeemed to sell at public sale, where this is practicable. With pledges of merchandise without a contract as to conversion, the only absolutely safe plan is to sue, recover judgment, and take the collaterals on execution.

6. Has there ever been a judicial decision in this State as to the responsibility of the holders of securities lodged as collateral security in case said collaterals have been stolen? When every proper precaution has been taken are the holders of the collateral liable, and is the drawer of the note freed from any obligation to pay, in the event of the loss by theft of the securities?

A. It is a well settled principle of law that the custodian of collaterals is only bound to use "due diligence" in the care of them, and if this is not impeached the obligation of the borrower can be collected, although the securities are lost. Exactly what is due diligence must be settled in each case by an uncertain reference to the decision of a jury. In the suits growing out of the Ocean Bank robbery the owners of the missing property contended that the deposit of such valuables in a vault floored with thin flagstones was not due diligence in the care of them, but there was no dispute as to the position that if proper care had been shown the loss must fall upon the owners and not upon the bank.

7. A banker discounts for the mutual benefit of maker and indorser, the note A B, indorsed by C, holding as collateral stocks belonging to A B, the maker, in excess of the amount of the note. Can the banker hold the excess for the payment of other indebtedness to him of the maker and indorser, as against the attachments of their other creditors? Please give the authorities?

A. We know of no American decision in which the question

above presented was directly decided either way. Morse says it has been claimed that the banker's lien extends not alone to the general deposit of the customer, but to any business paper, as notes or bills, belonging to him, and which he has intrusted to the bank for collection, "but in this broad form the statement is hardly correct." (Morse on Banking, 34.) He also remarks that there have been few decisions in America as to what property in the possession of the bank the lien will attach to. It was considered a question of some difficulty by the United States District Court for the Northern District of Illinois, *in re* Farnsworth, Brown & Co., 5 Bliss, 223, whether the bank had a lien for its balance as against the creditors in bankruptcy, on drafts of its customer held for collection. The lien was in fact allowed, though for reasons which would not apply to the case of pledged securities. The Court argued that "it was evidently never intended that the bank should pay over to the firm the specific money collected," and left the inference that if such had been the fact the lien would have been denied, and this would also have been denied in the case presented by our correspondent. Morse thinks the English cases would doubtless be regarded as sufficient precedents to lead the decisions on similar points in this country, and the summary statement of the following makes strongly against the existence of a lien in such a case as that of our correspondent: *In re* Medewe, 27 Beav., 528; *Vanderzee v. Willis*, 3 Brown C.C., 21; *Zuick v. Walker*, 2 W. Bl. 1154.

8. A party wished to get a certain sum from a bank and offered to give as collateral security a certain number of shares of bank stock. The bank is willing to make the loan, but requires the party wishing to make the loan to have the stock absolutely transferred to it, and bring them the certificate of stock made in the name of the bank making the loan. The borrower contends that the indorsement of the certificate in blank in presence of a witness, and the statement on the face of his note that he leaves number of shares of — Bank as security for this note, amply protects the bank as far as the certificate goes, and give the bank perfect right to sell the same if his note is not paid at maturity, and apply the proceeds to the payment of his note. Is the position taken by the bank necessary in law to protect its interest, and does not the position taken by the borrower amply protect the bank as far as the certificate of stock is concerned?

A. It is not customary to transfer the stock, the security

being considered sufficient, if the stock is good when the transfer on the certificate is signed in blank. We presume the bank lending the money has an idea that the bank whose stock is represented can place a lien on its shares for a debt due to it from its stockholder.

9. A loans B money, on call. B being unable to respond to call, at the moment, at A's request gives A mortgage for the amount, on his (B's) property as security, with the understanding that A is not to record mortgage, unless B should become embarrassed.

Suppose B becomes embarrassed and fails, would this mortgage be legally valid, if not recorded until day of, or day after failure?

A. The word "property" is vague. If it means "chattels," it is not a valid lien as against the creditors of the mortgagor without record. But if it is real estate, it would be valid without record, unless a subsequent mortgage or conveyance made in good faith was recorded before it.

10. A loans B \$100,000, taking United States bonds as security. He deposits the bonds in a safe in the Stock Exchange vault, or the Safe Deposit Company. These vaults are supposed to be the most secure places of the kind. A fire occurs destroying said vault and securities. Can A compel the return of the loan? In other words, upon whom does the loss fall?

A. If without A's fault the securities are missing, he can recover his loan of B, and the loss of the bonds will fall upon the latter.

COLLECTION.

1. A customer of ours, residing in some country place near this city, sent us a check as payment for a debt, drawn on a banker's firm in his place. This check we deposited with our bank the same day we received it. About 12 days afterwards we received notice of protest. Our bank having no connection in this country place, sent this check to the very banker it was drawn upon for collection, and this banker returns for it his check drawn on a New York city bank, and this check is not paid by the latter and therefore protested. Who is the loser, our bank, our customer, or we?

A. We think the bank is responsible, and must account for the proceeds to the depositor, as it took the last-named check in payment at its own risk.

2. A note is made payable at Macon, Georgia, with interest from date and exchange on New York. Has the bank which takes it for

collection a right, and is it customary to deduct collection charges from the amount of the note with interest?

A. A bank or any other collecting agent certainly has the right to make a reasonable charge for collecting; and at many points in the South, and also at the West, it is customary to do this, especially where the correspondent has no claim on the agent for such a service.

3. In the regular course of business with our bank we deposited with them for collection a note for \$2,000, due in Chicago on the 13th instant, which was paid on that day to the bank's correspondent. The latter failed to remit for this collection, and suspended five days after receipt of the money. Is our bank responsible to us for any loss we may sustain?

A. We hold that the bank here is responsible. We do not believe any first-class bank in this city will deny such responsibility. If they do, they may as well shut up shop, or at any rate abandon the collection business to outside agencies, and give up all the custom that is drawn to them through such an agency. We know all that may be said concerning the hardship of being held responsible for an agent who is chosen "with due diligence" and who collects a note, and, putting the money in his pocket, fails to remit; but in our judgment the hardship would be still greater on the other side if it was a sufficient answer to the depositor who inquired if a note had been paid, "O yes, our agent collected the money, but he has spent it, and you therefore have lost it!" We believe that a refusal on the part of any bank to recognize its responsibility in such a case is both illegal and impolitic. We hold that the bank can be compelled to pay the money, even though its agent does not remit it; and that a refusal to make prompt settlement will injure it more than the loss of the money.

4. If a party living in the interior sends us a draft on a party here at one day's sight, with bill of lading attached for 100 bales of cotton, and on acceptance of that draft we give up the bill of lading, and party accepting draft fails to pay it at maturity, can party from interior hold us for amount of draft, we charging no commission for collecting? If we act as brokers or bankers, and charge a commission for collecting, can they hold us for amount thereof? In either case, whether as bankers or brokers, or not, we have no instructions from party in interior.

A. The question is one of fact as to due diligence, to be determined in each case by the circumstances thereof. Two or three years ago a flour dealer in Richmond sold to a customer in Philadelphia several bills of "shorts," drawing at sight therefor,—and pinning the bill of lading to the draft, deposited the papers in his own bank, the draft usually going to his credit, and the Richmond bank forwarding the same to Philadelphia for collection. The Philadelphia bank then collected the draft and gave the bill of lading to the drawer. After several such transactions the buyer wrote to the seller, requesting him to draw at one day's sight, as the draft came so much in advance of the property. This was done upon the next shipment, the papers being sent in the same way without instructions. The Philadelphia bank, upon the acceptance of the draft by the drawer, delivered him the bill of lading. Once in possession of the property, he immediately converted to his own use and allowed the draft to go unpaid. The case was submitted to us, and we decided that the Philadelphia bank had no right, under the circumstances, even without instructions, to separate the bill of lading from the draft, and must therefore bear the loss. That bank did not acquiesce in this view at first, and the Richmond bank, which had paid the drawer the money, charged it back to his account. Subsequently the Philadelphia bank reconsidered its decision and voluntarily paid the amount of the draft, charging it to profit and loss.

In all cases, unless the collecting bank has some reason to infer that a separation of the two papers is desired or authorized by the drawer or his immediate agent, it should insist on payment or security before delivering the title to the property represented by the bill of lading. In our judgment the collector, without instructions expressed or implied, surrenders the bill of lading at his risk and peril, and if the draft is not paid is bound to make it good.

5. You take the position that the collecting bank is liable if bill of lading is surrendered before payment of the draft, or rather its maturity, and a default on the same. Do you mean that this liability will attach, when the bill of lading does not consign merchandise to "order," but simply to the drawee or consignee, who under such bill

of lading could get his goods at any time without producing bill of lading?

A. The conditions cited will make no difference in the liability. We have never decided that every bank is liable who surrenders a bill of lading which has been attached to a draft forwarded to him for collection. Sometimes special instructions go with the papers ordering a surrender of the bill of lading upon the acceptance of the draft. Sometimes this direction is to be inferred from previous instructions, from established custom between the parties, or from the circumstances of the case. All that we have said is this: A bank officer or other collecting agent who receives a draft to which a bill of lading has been attached as an apparent security, has no right to surrender it (having no instructions to this effect expressed or implied) until the said draft is paid or secured to his satisfaction, and is therefore liable in such a case if the title to the property has been given up, and the draft is not paid.

The assumption by our correspondent that the consignee named in a bill of lading may obtain possession of the property without it, and therefore that the possession of that document is of no importance, is based on the practice of some carriers which is looser than the one against which our first caution is directed. It is true, as we explained in a previous discussion, that the shipper, to have a perfect lien on the property in transit, must take the bill of lading to his own order, but if he does not, and he retains the bill of lading, he may stop the goods at any time in transit, since the consignee cannot compel delivery to himself, nor give title to any third party to receive it, without the possession of the document. It is the loose practice of many carriers to deliver the property to the consignee without asking for the surrender of the bill of lading. But suppose that the consignee has previously received this bill and indorsed it over to a third party, who has made an advance on it, and the carrier delivers the property to the consignee without the surrender of the bill of lading? Does not our correspondent see that the holder of that bill of lading thus assigned to him could recover the property, or its value, from the carrier? The promise in the bill is to deliver to the consignee *or his assigns*; for this purpose he has issued so

many copies of this bill, one being presented, the others to stand void. Until one of these has been presented, the carrier is liable to an innocent party to whom the bill may be assigned, and who may advance on the strength of the promise.

Thus, where goods are shipped to the order of the shipper, the control of the property is wholly in his hands and goes with the draft to which the bill is attached. Where the goods are shipped to the order of a consignee at the place of delivery, and the bill is sent with the draft, the property should still be held by the carrier until the said bill is surrendered, or he may be liable for its entire value.

6. A, a merchant in Richmond, through his home bank draws a sight draft on B, a merchant in Petersburg. The original bank with which the draft was deposited, after waiting the usual time to hear from the Petersburg bank, but from which it has not heard, permits A to check against his draft. It turns out that B is insolvent, and the draft is returned protested. Now the question is, would the home bank have recourse against A, to whom it had advanced the money, or against the bank to which it sent the draft for collection?

A. If there was no want of due diligence on the part of the banks which attempted to collect the draft, A must refund the money and that is the end of it. If there was culpable negligence, A can recover all he has lost through such fault of the bank in which he made his deposit, and that can recover of the other bank which committed the fault. There is nothing in the statement made which necessarily involves either bank in such liability.

7. Is a bank, acting as agent in receiving collections, if unable to collect the full amount of the claim, *required* to accept any portion of the same that may be tendered, or, in receiving drafts for acceptance, is the bank or its notary, in presentment of the same, if unable to obtain an absolute or unconditional acceptance of the draft, *required* to take an acceptance on the best terms that can be procured, though it may not be for the full amount of the claim, or it may slightly differ from the conditions of the draft, or the signature vary slightly from the address of the drawee upon the bill?

A. A bank as collecting agent may accept of partial payment without risk, but it is not required to do this; nor is it required to take an acceptance on a draft if tendered for part of the amount, although it may and protest for the balance if it deems such a course for the interest of its principal.

8. We deposited at our bank here for collection a sight draft on a country correspondent. It was sent to the bank in the country where our correspondent kept his account and was only returned to us after 90 days by the country bank, unpaid, no notice to that effect having been received by us or our bank in all the interim. Should not the country bank pay?

A. The country bank does not appear to have used due diligence in the collection, but it does not follow that it is liable for such neglect to pay the draft out of its own coffers. It seems to us that the bank in which it was first deposited ought to have taken some steps, inside of three months, to ascertain what had become of that draft.

9. A receives B's check on the Orange National Bank for \$100, and deposits same in Central National Bank of New York as a deposit. The Central National Bank sends the check through their agents, the First National Bank of Newark, which collects the money but fails before paying Central National Bank. Does the Central Bank or A lose the \$100?

A. In a leading editorial we noticed the new departure by our Court of Appeals on this very question. In *Ed. Indig. v. National City Bank of Brooklyn*, the highest Court in this State, by the casting vote of the presiding judge, held that the collecting bank in such a case, if it has used due diligence in the collection, is not liable to the depositor if through the failure of the out-of-town collecting agent the money is lost.

10. I beg to call your attention to the inclosed decision of Judge Dillon of the United States Circuit Court, and invite your comments thereon. The case is one of considerable interest, and indeed of importance, in the principles involved, and the conclusions reached will, I think, be a surprise to most bankers.

A. The case inclosed is that of the German American Bank of Gustav Levi & Co., Quincy, Ill., v. National Bank of the State of Missouri, and the receiver thereof; and the facts, briefly stated, are that the plaintiff sent a bill of exchange to the defendant bank "for collection and credit;" that the defendant received payment in a check, which it had certified, and then credited the amount to plaintiff. The collecting bank then suspended, and after suspension collected the funds on the certified check, which thereupon went into the receiver's hands. The

plaintiffs claimed that they were entitled to these specific moneys, and were not relegated to the position of general creditors of the suspended bank, and the decision of the court sustains their claim. Judge Dillon, in reaching this conclusion, makes two principal points, viz.: first, that the receipt of a check, no matter though certified, was not *payment*, and therefore that the draft was not in fact collected until after the suspension of the bank; and second that the money thus received was received in trust for the plaintiff's bank. In a legal point of view there is nothing new or startling in these positions, and we consider them sound. The defendants urged that their act in crediting the plaintiffs with the amount of the bill, upon receiving a certified check for it, was, so far as the latter were concerned, a complete performance of their agency, and that they then became general contract creditors for the sum credited; but Judge Dillon dismissed this contention by saying that the credit was provisional merely, and denied that the defendant bank could thus change the nature of its obligations. We think that the general principles governing the relations of principal and agent support the Judge's conclusions on this head.

11. A dealer lodged a note for collection in a New York City bank, payable in a town near Boston. Several days after maturity, and no protest received, the New York bank credits the note, less expenses, in the dealer's pass-book, who then pays his Western correspondent's draft for the net credit. The bank having subsequently received a protest of the note from its Boston bank correspondent, charges back the note to the dealer. The Western man cannot or will not respond. On whom should the loss fall?

A. If the collecting agent used due diligence in protesting and mailing the notices, the loss follows back as far as it can go toward the man who has the money. If he will not return it, then the man who sent it to him, and to whose account it has been charged at bank, must lose it.

12. Some two years since we sent a draft to a banker in this State for collection. He collected money on it which he has never paid over to us, since which he has made an assignment. Cannot we commence suit against him criminally, and shut him up for not paying the funds over to us?

A. It has been decided that the failure of a banker to pay

over to the owners the proceeds of collections made by him is not a breach of trust for which he is liable to a criminal prosecution.

13. As the treasurer of a society, and having bills to collect against the members, I hand a number of such bills against members in *arrears* to a collector, and agree upon a percentage for collecting. He calls upon *all* of the delinquents. Some of the bills are paid to him and others handed to me. Is the collector entitled legally to his commissions on the amounts handed to me personally by the delinquent members, and would your decision as regards this State hold good in New Jersey?

A. The case stated has not been adjudicated either in New York or New Jersey, so far as we know. But "the general rule of law as to commissions undoubtedly is that the whole service or duty must be performed before the right to any commission attached." (Story on Agency, 329.) This rule is modified by the prevailing customs recognized in different trades. Where the agreement does not distinctly specify how the commission is to be earned, however, it would be left to a jury to say what compensation was reasonable; and if it appeared that the payments were made direct to the principal in consequence of the agent's proceedings, no doubt an equitable allowance would be made.

14. We sent for collection a sight draft for \$121.85, on one of our customers in Dallas, Texas, through the first national bank there. The draft was paid, and the bank sent us a draft on a New York bank, which, upon presentation, told us that it was not good, inasmuch as the Dallas bank had failed. A receiver was appointed who offers through his lawyer 25 cents on the dollar. Are we not entitled to the full payment of our claim?

A. Our correspondents are entitled to full payment from all their debtors, but this is not different from other debts, and we suppose they will be compelled to take what they can get, unless they can show a special contract with the collecting bank, by which the proceeds of the draft were not to become its property, according to the general rule.

15. We sent to a bank in another city a sight draft on a customer, with the request to "collect and remit proceeds." The customer paid the draft and the cashier of the bank sent us his draft on a bank in this city. This we deposited on the day it was received, and the next day it was returned to us as not good. We afterward learned that the

bank to which we sent our draft for collection was, at the time it was received, under examination by the Bank Superintendent. On the day we received the cashier's draft, an injunction was served on the officers restraining them from any interference with the funds of the bank. We are also informed that there were no funds in the New York bank at the time the cashier sent us his draft. The bank whose draft we hold is now in the hands of a receiver. Do we stand in any different position from other creditors? Was not the bank acting as an agent simply to collect, and was it not its duty to "remit proceeds" as we directed, instead of taking a worthless draft? Is not our claim entitled to preference over the claims of depositors and others?

A. As the bank suspended after the receipt of the money, our correspondent's claim is entitled to no precedence, and he must take his chances with other creditors.

16. If a country bank to which we send collections fails with the proceeds of our draft in its possession, must we appear as a creditor of the bank? Or if the bank remits the proceeds and fails while the remittance is in transit, what is our position in the case?

A. A person who sends paper to a country bank for collection becomes a creditor of that bank if it fails before his remittance is forwarded. If it fails while the remittance is on the way, and the latter proves to be good, he is lucky enough to escape; but if the remittance is a draft not honored on its arrival his position is unchanged.

17. I get this from a distant correspondent:

DEAR SIR: I inclose for acceptance and collection draft, 15 days sight, on Jno. Smith & Co., \$100; no protest.

It is duly accepted by John Smith & Co. It falls due to-day, and if not paid shall I protest it for non-payment?

A. The instructions "No protest" apply fairly to the non-acceptance or non-payment of the draft, since the words follow the "acceptance and collection" for which the draft was enclosed. The collecting bank therefore ought not to protest in case of non-payment.

18. Banks are sending papers for collection with indorsements stamped instead of written. Can drawee demand a written indorsement? And can I protest on his refusal to pay without it?

A. All our correspondent has to do is to present the draft or note as it was received, (with his own indorsement if to his order,) and demand payment. If the drawee or payee declines

to pay, then the collecting agent may protest it. The regularity and sufficiency of the indorsement are guaranteed by the collection ; if protested the question whether the indorsement was sufficient is one between the original drawer or owner of the paper and the payee who refused to make payment. Any method of making a signature which the maker utters is a good signature, and binds him if it can be proved that he made it. The only objection to a printed or stamped signature, lies in the increased difficulty in proving that it is genuine ; that is, that it was actually affixed by authority of the person or institution it represents.

19. John White, of New York, draws a sight draft on William Jones, Augusta, Ga., for \$1,000, "with cost of collection." The bank to which it is sent collects "free of charges." Can the bank legally demand of the payee the difference of exchange between Augusta and New York, the rate being $\frac{1}{4}$ of 1 per cent. per annum ?

A. The collector in Augusta may protest the draft if Jones will not pay the difference of exchange between the two points, or whatever may be reckoned as reasonable "costs of collection."

20. Our correspondent in the country receives notes payable at a bank in a town twelve miles distant from our correspondent. We learn that the bank in the latter place (the only one there) has failed or suspended. Before the bank failed he had been in the habit of sending these notes by mail to the bank which has now failed. What is the duty of our correspondent with respect to presenting and protesting notes maturing in the next few days at the failed bank ?

A. He must employ some one to present the notes for payment at the institution, and if he can learn that any other provision has been made to protect the paper, he must use due diligence to present also at the new location before protesting for non-payment.

21. If a party sends us his own one day sight draft on another party, without any instructions as to protest, the same being accepted, and if not paid when due, would we be liable if we did not protest ?

A. The failure on the part of an agent to protest a draft intrusted to him for collection, in the absence of any instructions to this effect, expressed or implied, will render him liable, not for the face of the document, but for whatever damages may result to the principal from such mistake. In the case cited we

cannot see what possible damage can have resulted from the omission to protest, and therefore the agent cannot have compromised himself very seriously by his course. The damage must be established by proof before it can be collected.

22. In receiving for collection commercial paper liable to protest for non-payment on parties living at places not having banking facilities, it is my rule in acknowledging receipt to notify the bank, or the party sending, that for reasons stated we will not hold ourselves liable for non protest in case of non payment. Now I ask your opinion : Will this notification of mine hold good and protect me from liability ?

A. It has been assumed in judicial opinions and by text writers (*Ayrault v. Pacific Bank*, 47 N. Y., 573; *Daniel on Negotiable Instruments*, 1,255), that a bank or other collecting agent may make a special contract varying the obligations which would be imposed by the mere act of undertaking the collection of paper. But the duty of taking all the necessary steps to insure collection is so strict that something more than mere notice would appear to be necessary to vary the implied contract. If, for example, such a notice should be sent, and without waiting sufficient time for a reply, the bank should forward the note for collection, and thereupon the amount should be lost for want of due protest, we doubt very much if the notice would save the collecting agent harmless. If on the other hand time was given in which the principal might have expressed his dissent, and he remained silent, it would not be in accordance with the modern drift of adjudications to say that a new contract would not thus be created.

23. A sends drafts for collection to a bank in the country ; B, on whom they are drawn, accepts the same ; before they are due the bank fails. Who is responsible for the amount ?

A. A can stop payment to the bank if it becomes insolvent before the drafts become due. If the bank receives payment after failure, A can recover it as money belonging to him and not to the bank's account.

24. We received some time ago from our bankers' a draft on a Western city for collection, collected the same and remitted the net proceeds at once by a bill of exchange bought of the same banking

house where we had been in the habit of buying our exchange for years, and also two bills after the one in which the above mentioned amount was included. The banking house here failed and the very bill of exchange was dishonored, as well as those bought afterward. We charged no commission for collecting, and simply did it out of courtesy. Are we to stand the loss or will our friends have to bear it?

A. If the house sent over here a draft to collect, with instructions to the agents here expressed or fairly implied to collect it, and with the proceeds to purchase a bill of exchange and remit the same, and the agents executed the order with due care and diligence, purchasing a reputable banker's bill, and forwarding the same without indorsement, they are not responsible. But if the agents had no orders, or if they indorsed the bill in their own name, they may be legally held for its payment.

25. A correspondent in a neighboring city sends a note for collection to the bank where it is made payable. When it falls due, the maker has no funds in bank, and the note is sent to his place of business to be collected. In the meantime the letter and check are prepared and laid aside to await payment of the note. The note is not paid, but the letter with the check is mailed by mistake to the owner. A night telegram is sent apprising him of the error, and asking the return of the check, which he declines.

A. The return of the check, thus sent by mistake, is called for by a due regard for one's own honor, to say nothing of the claims of morality; and it may be legally enforced, beyond any question. The receiver of money paid by mistake has no legal title to it, and no moral right to retain it.

26. Where it is customary for a bank to credit a customer with his country drafts without charge, and such drafts sent to its correspondent in the town where they are payable, who collects the same and suspends without remitting, can the bank hold its customer for the amount?

A. The bank in which the drafts are deposited is liable to its customer, unless it has a contract with him that the collections are to be made at his risk.

27. A had been treasurer of a school district and B is appointed in his place. The trustees of the district thereupon gave B an order on A for the money in his hands. On the 28th day of November A gave B a check on a New York bank for the amount, which I deposited in a bank here the same day, and was credited with the money. In a day or two A demands his bond from the trustees, and is refused

until B can assure them that the check had been paid. B calls several times at the bank for a week or more, and is told that, not having heard from the check, they presume it had been paid, when B notifies the trustees that he believed the check had been paid and that they can give A his bond, which is done. Nothing is heard from the check by B until the 16th day of January following, when he is notified by the bank here that it had been lost in the mail and requesting him to procure a duplicate from A. B calls on A the following day, who agrees to give him a duplicate, but makes an assignment the same day without doing so. The check was good at the bank in New York for several days after its date. Please answer on whom the loss will fall?

A. In our judgment the loss will fall on the bank with whom B deposited it for collection. It was not due diligence on their part to discover the loss of such a check more than six weeks after it should have been paid.

28. If a paper sent to a bank for collection has the words "no protest" written in ink on the face of the draft, and is protested, can the notary protesting claim his fees?

A. The notary cannot in this case collect any fees of the owner of the draft.

COMMERCIAL TERMS.

1. A charterer of a vessel agrees to deliver cargo alongside; will you please inform me how this applies? If it does not mean within "reach of vessel's tackles," and if so, what that term is? How many feet from the vessel, and where we can find the authority? Again, is it allowable in delivering alongside to do so from the hold of a lighter, or must all cargo be on deck of lighter?

A. A delivery of cargo to a ship is governed very much by established usage at each port. To be "within reach of ship's tackles" it must be so near that the actual gearing of the ship for handling cargo may reach and be attached to it. If a lighter has a covered deck the "hold" would not be a proper place from which to tender cargo to a ship unless there was a well-established usage at some port to this effect.

2. When a cargo is damaged by accident to the vessel or steamer, are the insured, as well as the uninsured consignees, required to sign an "average bond" before the goods saved are surrendered to the respective consignees?

What is the full meaning and purport of an "average bond"?

A The contributions of cargo under general average are con-

fined to cases where it has been deemed necessary to sacrifice or damage part of the cargo or part of the ship to save the rest, all of the ship and cargo saved contributing pro rata of its value to such a loss. If goods are thrown overboard to keep the vessel from sinking, the ship and remaining cargo alike contribute in proportion to pay for the sacrifice, and in the same way, if part of the ship or outfit be cut away or sacrificed in a storm or time of danger, for the common safety, all that is thus benefited contributes to pay for the sacrifice. When goods are delivered under the average bond, the owner takes his goods and simply binds himself and bondsman to contribute his share of the assessment.

3. If I sell pig lead on a contract reading "one hundred tons or ten car loads," how much am I called on to deliver? In other words, what is the term car load supposed to mean, and what constitutes a ton according to the law of this State?

A. A legal ton is 2,000 pounds in this State (N. Y.); but a contract is to be interpreted according to the sense in which the universal custom of the trade would accept the meaning of the terms. The difficulty of this agreement is that its ambiguity is not confined to the meaning of the word ton, but to the indefinite alternative. A car load may be 20,000 to 23,000 pounds. In our judgment the seller could only be compelled to deliver 200,000 pounds if that was all the ten cars contained; and he could legally tender to the buyer the entire contents of the ten cars, even though they should amount to 230,000 pounds.

4. A sells to B a bill for cash and delivers the goods on the 15th inst. On the 16th A calls at B's office to collect amount of bill and payment is refused, B claiming that cash is payment at any time within 30 days from date of invoice and delivery of goods.

A. In many departments of trade the term "cash" on a bill has come to have a conventional meaning, and is fully answered in such cases by a payment within 30 days. "Net cash" is no better since it is merely to cut off a demand for discount, and does not imply any earlier promise of payment. The only way to secure immediate payment without question, is to mark the bill C. O. D. or "cash on demand," or "cash in three days" which gives the buyer time to examine the goods.

5. Will you inform me of the meaning of the following terms : "Cash," "net cash," "prompt cash" ? and much oblige.

A. A bill marked "terms cash" leaves it undecided whether a discount is not to be made, while "net cash" disposes of that question. Usually "cash bills" are collected within 30 days, but "prompt cash" is supposed to mean cash down, or payment immediately on examination of the goods delivered.

6. Please define the following : "A chop of tea," "An invoice of tea," "A line of tea," "A bracket of tea."

A. A CHOP of tea is the entire quantity of a certain kind of tea brought to market, or in China, the entire quantity of that kind that is made. This usually (in Congou) comprises from 600 to 1,000 chests. It is equivalent to "a dairy" in the butter districts.

An INVOICE of tea is the whole of a shipment made by a particular shipper, or sent in one lot to a particular house.

A LINE of tea is the quantity contained or described in one line in a catalogue.

A BRACKET of tea describes all the lines in such a catalogue that are contained in one bracket. Every auction catalogue will have in the course of its offering, two, three, five, or more lines tied together in this way.

7. Does a draft drawn "at sight" carry grace ? Is there any difference between a draft drawn "on demand" and "at sight" ?

A. In this State (N. Y.) grace is expressly forbidden by statute on all sight bills. Where grace is allowed by law or custom on bills payable "at sight" the courts make a distinction, usually, against goods payable "on demand," as not within the privilege. Kent's Com., vol. 3, page 102. Story on Bills, sec. 342.

8. When a mercantile house is obliged, from one cause or another, shrinkage of assets or injudicious over-issue of paper, to allow its notes to go to protest and stop payment on all its liabilities, does it not, although it may in time pay in full, really *fail*, or does it merely "suspend" ?

Does the word *fail*, in a mercantile sense, mean a failure to meet maturing obligations at bank and otherwise, or does it simply signify a failure finally to pay the full amount of indebtedness at the convenience of the promissor ?

A. To *fail*, in a financial sense, is to become unable to meet one's engagements, and as far as a suspension is a failure to pay liabilities as they become due, the latter term may be applied to it. In common speech, however, a temporary delay of payments by a solvent firm, owing to a financial crisis in the money market, or to some sudden or unexpected embarrassment, is called a *suspension*; and absolute bankruptcy or insolvency is called a *failure*.

9. What difference is there between a Finland *ton* and a Finland *last*, vessel measurement? Please give the exact proportion one bears to the other.

A. It seems that this has been the subject of much inquiry, not only among the Finland and Russian merchants here, but also of the consuls and other officials, since when our inquiries went out into all these circles they recognized the question, but could not give its solution. We are very glad in these circumstances to know that our column is equal to the occasion. *Last* in Scandinavian language means "a load," and this varies in different countries. A *last* in Finland is equal to $149\frac{1}{4}$ *poods*. A *pood* is 40 pounds Russian and 36 English pounds; or to be more exact 36 pounds, 1 ounce, 11 drachms in the latter weight. A *ton* in Finland is 63 *poods*; hence to change any given number of lasts into tons multiply by 149.5 and divide by 63. To change tons into lasts multiply by 63 and divide by 149.5.

10. I find in the finance column of a New York paper that the rates paid for "carrying ranged from 5 per cent. to flat." What is the meaning of "flat," and if it means no percentage, how could a broker carry gold or stocks without interest?

I also find a New York report that "money opened at 6 and 7 per cent. on call, advanced to 1-32 and interest, and closed at 4 per cent." What is meant by "1-32 and interest?"

A. "Flat" means free of interest. When gold or stocks loan "flat" it is because there is such an abundance of either or both in the market that lenders are willing to loan them free of interest in order to get the currency for temporary use, which currency they are able to employ in other transactions.

By 1-32 and interest is meant the commission of 1-32, about 12 per cent. per annum, which the borrower pays in addition to the legal rate of interest for the use of money.

11. Are mercantile terms (C. F. I.) cost, freight, and insurance, and (F. O. B.) free on board, identical expressions. Having received several orders lately from Europe for merchandise, I notice that in some instances F. O. B. is considered to cover freight, whereas I had always presumed the letters C. F. and I. were used in such cases.

A. We cannot say in what sense the writer's friends may have used these abbreviations, but we have always understood that "F. O. B." in an order required the shipment of the goods at the price named, free of all other charges up to the day of sailing; and C. F. I. to require the price named to limit the cost up to the point of delivery on the vessel's arrival. When a man in New York orders an article in Liverpool by a steamer at a certain price F. O. B., he means that to cover the cost of placing it on board the steamer there, ready for the voyage; but if his order is C. F. I., that would bring it free to the landing in this city (N. Y.).

12. A vessel, 540 tons, gets a berth outside another vessel, April 23, 8.30 A. M.; the 24th, 9.30 A. M., she takes the inside berth, where she remains till May 3, 6 A. M. What wharfage does the law allow to be collected from vessel? The wharfinger claims 10 days at \$5.70. I insist that vessel has to pay 9 days full rate and 1 day half rate. Vessel did not discharge while lying outside. What is the definition of a day in the following sentence: "For every day or part of a day?"

A. The phrase "for every day or part of a day" is interpreted as giving a full day's wharfage for each full day, and reckoning a fraction of a day also as a full day when the period laps over one or more days upon another. But the act of 1877 explicitly establishes a half rate for vessels outside and not discharging. The question now is whether the wharf owner can reckon the part of April 24, before 9.30 during which the vessel lay outside, as a full day (at half rates) and the remainder of the day inside as a full day at full rates, thus making two days at half rates, and nine days at full rates, equivalent to ten days at full rates. The law is open, perhaps, to such a construction, but we doubt if the courts would allow the charge, or equity permit it. We think nine days at full rates and one day at half rates a legal settlement for the service.

13. Please give a full explanation in regard to the so-called "general average," caused by damages to ships. We have a cargo on

a German vessel, which is insured in a foreign company, with the clause "insurers not answerable if damaged below 10 per cent." It appears that there is no loss on our goods, they being but slightly touched. Are we responsible, pro rata, for the injury of the ship, and so, have we any redress on the insurance company, notwithstanding the above circumstances? As far as I remember, the insurers are held to pay expenses for repairing the vessel, but should not the owners deal directly with the insurance companies, as the damage refers to the ship and not to the cargo? Do you think it right to hold an insurance company responsible for damage on the ship, when they merely insured the cargo?

A. On the subject of general average, Parsons remarks: "Substantially the rule is this, that where maritime property is in peril, and a sacrifice of a part is made for and causes the safety of the rest, that which is saved contributes to make up the loss of that which is sacrificed." (Parsons on Contracts, ii, 323.) He further says: "Insurers are liable for a general average when they insure against that peril or loss to avert which the sacrifice was made; for a loss by contribution is regarded as a loss by that very peril." If the goods are separately insured, the shipowner has no claim for contribution directly against the insurer, but against the owner of the goods, who then has his remedy over against the insurer. As to the damage to the ship for which the cargo is liable to contribute, it is impossible to lay down a rule which will cover every supposable case, but the loss must have been incurred for the purpose of saving the ship and cargo from peril.

14. Will you please inform me of the meaning and origin of the term (frequently used) "The Law Merchant?"

A. The "Law Merchant" is the name of that system of law which the courts of England and the United States apply to mercantile contracts. It is a branch of the common law, and includes the law of shipping, marine insurance, negotiable bills of exchange and promissory notes, and sales.

15. Please explain the meaning of the word "limited" as applied to corporations and copartnerships?

A. In England, in New York, and some other states, joint stock corporations and associations are allowed, and the stock holders are exempted from individual liability on condition,

prescribed by law, that the name or title contains the word "limited," to be used always in all business of the concern.

16. Will you please inform me of the full meaning of the word "limited" as applied now-a-days to partnerships?

A. The statute authorizes the formation of joint stock companies, without the personal liability of the stockholders, provided that the word "limited" is incorporated in the name and constantly used.

17. Does the meaning of the term "on call" in financial circles imply that money borrowed "on call" must be paid immediately on the demand of the lender? And, also, must the borrower be provided at all times subsequent to the loan for the contingency of the "call" or is there some notice given?

A. No notice is to be given, and the money must be returned the day it is called for, before the close of banking hours.

18. Please state how "preferred" shares of a railroad are usually created, and why these shares should take precedence over the "common stock," when a dividend is earned?

A. Preferred stock is usually issued for borrowed capital. It is second to the interest on the bonded debt, which must first be paid. If there are any earnings left they go next to pay a dividend on the preferred stock, and only what then remains is applied to the common stock.

19. Please inform me if a note made out as below is sufficiently explicit as to promise to constitute a "negotiable" note?

\$100. This is certify that there is due by the congregation of — church to John Smith, Esq., or order, the sum of \$100, payable in one year, with interest at 6 per cent, payable annually. _____, Pastor.

A. The writing comes within the definition of a promissory note given in Story, sec. 12, and it is negotiable because it is payable to a certain payee or order.

20. Will you explain to me what is meant by "puts" and "calls" in stocks?

A. "Put" entitles the holder to put or deliver stocks to the signer thereof within the time and at the time therein named. A "Call" entitles the holder to call for or demand stock of the signer according to terms specified. A "Spread" is another

term used, and this is a double privilege, entitling the holder either to deliver to, or to demand from, the signer a certain amount of stock on the terms specified. If the price named for both is the same, it is then known as a "Straddle."

21. We receive a cargo of sugar from Mexico. Bill of lading reads "Freight 30 cents and 5 per cent. per quintal," but does not state whether the same is Spanish or American weight. Can we figure the quintal at 112 or only at 100 or 101 3-4 pounds?

A. The custom of the port is to reckon such a contract at 100 pounds per *quintal*. The law of Congress, section 3,570 declares that the "tables annexed shall be recognized in the construction of contracts, and in all legal proceedings;" and in these tables a quintal (one of the terms of the metric system) is put down at 100,000 grains, or 226.46 pounds avoirdupois; but this is only when it is used as part of that system, and establishes its legal equivalent when so used.

22. A schooner was loaded with a cargo of frozen herring which cost \$1,900. She proceeded to the mouth of the river where she sprung a leak. She put into Eastport, Me., where a survey was held. The cargo was condemned and the schooner ordered to be recaulked. The captain called an auction on account of whom it may concern, and sold the cargo for \$480, which money he retained until it should be called for; about one quarter of the cargo was refrozen by the purchaser, and forwarded to Boston in another vessel, the balance was sold for refuse fish on the ground. The cargo was insured by the owners for \$2,000; the captain also had his freight money insured in another company. The insurance company paid the captain a percentage for the loss of his freight (probably enough to pay for repairs.) Are the insurance company *liable* for the *loss* on the *cargo*? They repudiate any claim, as they say it was only a partial loss, and the cargo was insured against total. The clause in policy reads: "Free of particular average." I am informed by reliable parties of New York that in such cases anything over \$50 is a technical total loss. There has been no call on the captain for the \$480, as the insurance matter is not settled.

A. The cargo having been condemned by a board of survey and sold at the port of refuge, it became a technical total loss for which the underwriter or the insurance company is liable. The insurer must be credited with the proceeds of the cargo sold, and must pay the difference.

23. 1. What is the nature, form, and legal and commercial value of a "warehouse receipt?"

2. Would it, in a case of bankruptcy, protect the holder against the claims of the other creditors of the warehouseman, the property, goods or merchandise covered by it being still in his possession?

A. 1. Warehouse receipts are in form simply what the name implies, a receipt issued by a warehouseman for goods received by him in store and held for the consignor or his assignee. They are assignable, but how far a mere assignment operates to pass the property to the goods, is a question yet in a very unsettled state. According to mercantile usage and understanding, the transfer of the document completes the delivery of the property, but the English courts have held otherwise, and the part of prudence, perhaps, requires that the assignee should not only be satisfied as to the title of his assignor, but also should perfect delivery by notice to the warehouseman.

2. The general creditors of a warehouseman could assert no claim upon the property held by him in store, represented by a warehouse receipt, but the holder of the receipt could require the delivery of the goods.

Another subscriber asks about a merchant issuing "a warehouse receipt for goods in his own store and to his own order," etc. If the merchant is not in the warehousing business, and the certificate is designed merely as a kind of chattel mortgage on a part of his stock, it would have to be recorded as such to perfect the lien.

24. What is the meaning of the clause "working days," that is occasionally inserted in charter parties. A vessel is chartered with the clause, "Three working days will be allowed for loading." She commenced taking in cargo on Saturday the 1st, but on Monday the 3d, and Tuesday the 4th, charterers are unable to give the vessel cargo, owing to rough weather prevailing, but she continued loading on Wednesday the 5th, on which day the vessel is dispatched. How many "working days" do you consider have been used?

A. The "lay days" in a charter party are expressed as so many "days," or "running days," or "working days." It has been legally decided that where "days" alone are named, the usage or custom of the port, or some law forbidding work on Sundays or holidays, must be shown, or all the days in the calendar will be reckoned. The expression "running days" is conclusive of this meaning, and the time commences at once and

continues without omission or intermission, no matter how impossible it may be to execute the work. But "working days" exclude Sundays, holidays, and rainy weather. No day is reckoned except such as may lawfully and properly be used in working. In the case cited above, if the cargo was not tendered until Saturday, she occupied but two working days in loading.

CONSIGNMENT AND COMMISSION ACCOUNTS.

CONSIGNEE.

1. A of New York ordered B, a commission merchant of a western city, to purchase 100 barrels dried fruit of prime quality. B made the purchase, shipped the fruit, charged regular commission of $2\frac{1}{2}$ per cent., sent invoice in his own name and drew at sight on A for the amount. A knew no one in the matter but B. On examination of the goods here it was found to be not prime, except on top and sides, and falsely packed underneath. A wrote B and demanded that the lot of fruit should be taken back and amount refunded, or that fruit of the grade ordered should be furnished. B wrote that he is only agent for A, and that A must look to C, of whom B purchased the fruit, for any damages. At the same time B admits that he did not examine the fruit thoroughly, but relied on representations made by C, of whom he purchased. Now B having had full opportunity to examine the fruit before accepting it, and having been paid full commission of $2\frac{1}{2}$ per cent., to whom must A look for damages? A knew B to be a responsible party, and for that reason gave him the order to purchase.

A. As B invoiced the fruit in his own name and furnished no statement concerning a principal, he can be held to have guaranteed the merchantable quality of the fruit. A can have recourse to B, leaving the latter to his remedy of C.

2. Suppose a commission merchant in Liverpool sells our tobacco and has accepted bills of exchange for net sales and he fails before maturity of said bills, what are the laws of England in such cases, provided the commission agent does not pay for the tobacco?

A. The statute 5 and 6 Vic., c. 39, gives agents or factors intrusted with the possession of goods power to put a lien upon them for loans or advances, and unless the lender acted in bad faith, or with notice that the factor had no authority to pledge the goods, it will make no difference how the latter appropriates or misappropriates the proceeds. But this provision is solely for

the protection of third persons who may innocently make advances, and the agent who exceeds his authority in this respect is liable to punishment criminally.

3. Suppose we have in Liverpool in the hands of a commission merchant £3,000 worth of tobacco on which no advance has been given, and the commission merchant should hypothecate the same to raise money for his own use, could the bank hold the tobacco to meet their debt after we had established the fact that the tobacco was our property and that no advance had been made on it except to pay ocean freight? What is the law of England to meet such cases?

A. Without special authority, the agent has no power, according to Paley on Agency, 49, and citations, to accept or indorse bills so as to charge his principal. The latter may therefore stop the payment of the bills, and require payment to himself; and there is authority for the statement that even if the bills are paid to the agent, after his bankruptcy, the principal may still demand and receive payment from the payor. Paley, 81; *Hudson v. Granger*, 5 B. and Ald., 27.

4. We are agents in this city for a manufacturer, who limits us to a certain price on his goods, and after our introducing said goods in this market, he undersells us to one of our customers. Are we entitled to any commission on such sale? and if so, what percentage? We receive 5 per cent. commission and guaranty on this account, regularly.

A. Unless there is a contract that the agents shall have a commission on all the goods sold, the manufacturers have the legal right to sell directly to any resident of that city without paying any tribute to our correspondents. It is not considered very honorable to do this, but there is no law that requires a manufacturer to be a gentlemen. We cannot say, in the case before us, but circumstances may have justified the sale referred to, but on the face of it the inference is not favorable for the producers.

5. We sell domestic goods on commission for a manufacturer at a certain price and allow a trade discount. The terms of the sales are 5 per cent. discount for cash in 60 days. Are we entitled to a commission on the net amount of the sale or on the actual cash received, or, in other words, do we have a right to charge commission before or after the discount for cash is deducted?

A. The commission is to be reckoned on the amount of the

bill of sale as rendered. If the goods were sold at 5 per cent. discount, or as certainly subject at all events to such a deduction, this percentage must be taken off before the commissions are reckoned.

6. What commissions has a house on goods consigned to them that have been destroyed by fire, when the agreement between the parties reads "we [the commission house] agree to keep all goods fully insured in first class companies;" and "we agree to charge for fire insurance, cartage, storage, etc., 1 per cent., and for commissions and guaranty 5 per cent., it being understood that the guaranty is $2\frac{1}{2}$ per cent., and the commission $2\frac{1}{2}$ per cent?" I understand that the matter was fully decided by the Boston fire, by the courts of law and by arbitration. Please state also the price of the goods that we are entitled to from the insurance company?

A. The commission house is entitled to full commissions on the goods destroyed. The price to be charged to the insurance company is the market value of the goods. The Massachusetts case referred to did not directly turn on the above point, but rather on the title to the insurance money. Goods consigned were destroyed in the great fire, having been covered by a floating policy of insurance in the name of the consignees, their commission to be five per cent. for all charges. The court held that the consignees, having made advances on the goods, had the same lien on the insurance money as they would have had on the goods. (Johnson vs. Campbell, 120 Mass., 449.) We have no means of ascertaining how similar cases were settled by arbitration.

7. A at New York consigns to B at Yokahama some goods to be sold for his account and risk. After disposing of a part, and finding the sale slow, on account of local legislation against their use, B consigns the balance to C at Shanghai, where they are sold. First, has B any right to send the goods to Shanghai without consulting A? Second, If, however, A, rather than have trouble, accepts the sales at Shanghai, can B properly charge him with the commission paid to C as well as his own?

A. If the goods were to be disposed of to the best advantage, and would not sell at Yokahama, B would seem to us to be justified in sending the remainder to Shanghai, and under the circumstances and according to custom would be entitled to charge full commission if under advances, and half commission on the residue not advanced upon.

8. A firm is dissolved by the death of one of the partners, consigned goods remain on hand at time of his death. Is the old firm or the person who sells the goods entitled to the commission on the sale?

A. If the goods are sold in the name of the old firm by the surviving partner, the commissions go to its profit and loss account, and the survivor is not entitled to any personal compensation for settling up its affairs. If the goods are transferred to a new firm, the old firm is entitled to the same commissions as it could collect if the goods were withdrawn by the consignor.

9. We have a consignment of goods which the consignor has sold without consulting us, and in such a manner that we desire to insist upon having all the commission, etc., to which we are legally entitled. Our terms are 5 per cent. commission, $2\frac{1}{2}$ guaranty, fire insurance, storage, cartage, etc. It is customary in such cases to charge one-half the ordinary commission, i.e., $2\frac{1}{2}$ per cent. and fire insurance etc, but we should like to know if we cannot collect our full commission of 5 per cent. before delivering the goods?

A. By the chamber of commerce tables the consignee is entitled to full commission to the extent of his advances or obligations in behalf of the consignor, and half commission on the remainder.

10. Under the following agreement, which does not contain any limit or stipulation as to time, can A terminate the same without being liable for damages to B? Should A sell to other parties in France, while no neglect on the part of B to fulfil his obligation can be shown, and thereby break the contract, can B recover damages, covering the expenses and charges, which in introducing the articles were much larger than the profits, and any prospective profits on estimated future transactions? Also, can B compel A to take back (in such event) the stock of A's goods that he may then have on hand at cost price?

Agreement between a manufacturer (A) and commission merchant (B), of New York; A to give B the exclusive agency and right to sell the goods of A's manufacture for and in France:

A agrees not to sell or ship any of his goods to France direct or through agents in the United States unless with consent of B. B agrees to do all in his power to introduce and sell at his expense and for his account said goods in France through agents in Paris, etc., by traveling, advertising, and such means as he may find expedient.

The agreement contains furthermore prices and terms.

A. On the presumption that the contract itself is valid, the damages for a breach of it would without doubt include the expenses described, so far, at least, as they have not been made up by the profits of the contract. As to the allowance of pros-

pective profits by way of damages, they seem, in the case before us, clearly to belong to the class of direct profits, which were in contemplation of the contracting parties, and which, in fact, formed the inducement to the contract; and such profits it has been well established by our courts may be allowed. (*United States v. Speed*, 8 Wall, 77; *Story v. The N. Y. and Harlem R. R. Co.*, 6 N. Y., 85; *Masterson v. Mayor of Brooklyn*, 7 Hill, 62; *Griffin v. Colver*, 16 N. Y., 489)—especially the last case cited.

11. A made a contract with B to sell goods for A on commission. The contract provided that notes taken by B on sales and delivered to A in payment of goods sold, should be indorsed by B. Settlement was made and notes transferred to A without B's indorsement, no reference being made to the contract. The notes maturing two and three years subsequent to the settlement are not collectible. Can A recover of B on the contract, or did the settlement and receiving the notes without B's indorsement waive that condition of the contract?

A. If under the contract B is responsible to A, as a guarantor of the sales he made, he must make good any such defalcation unless an express waiver is shown.

12. A ships a number of boxes of oranges to B, a commission merchant of New York. B sells a portion of them at satisfactory prices, and ships the remainder (without consulting A) further North to C, another commission merchant, where they arrive in a frozen condition. C sold them and remitted the net proceeds to B. There not being enough to pay the freight, and A being the loser, has he any redress?

A. If this adventure of re-shipment was undertaken by B on his own hook, we do not think he can have recourse to the owner for the deficit, although he may not be liable to A for the low rate at which they sold.

13. In August we shipped a commission merchant a large lot of dried berries and ordered him to "sell on arrival or to arrive." He disregards our orders and holds the berries. He died about the first of October. Can we not hold his estate for the value of our berries, on the date of his receiving them?

A. The consignee of a lot of goods is not legally responsible for disobeying orders to sell, unless it can be shown that he grossly neglected the trust he had undertaken. A mere failure to sell is not proof of such neglect. It is sometimes exceedingly difficult, if not impossible, to execute such an order.

14. A party ships me a quantity of vinegar to be sold on commission. My commission is 5 per cent., which the consignor knows. If I sell the vinegar and make a loss, using my best care and judgment in the matter, can the consignor hold me for the loss, providing I have not agreed to guarantee sales? Can you give me the law on the subject?

A. We suppose our correspondent means to inquire whether, if he sells the vinegar to a person he supposes to be solvent, and does not collect the money, he can be held to pay the consignor. Under the circumstances described we answer in the affirmative.

15. A consigns merchandise to B in New York without advances, the object of the consignment being to have the goods sold to the best advantage in the New York market. B wants money, and hypothecates said merchandise to accommodate himself. Is such proceeding considered in mercantile circles a breach of trust? In other words, is consigned merchandise, without advances, trust property? And is such proceeding legally wrong and criminal?

A. These breaches of trust, described above, are denominated *torts*, in the law; they are not *crimes* in the legal definition, but a milder species of wrong. The owner of the goods, or of the securities, may proceed against the first bailee for a wrongful conversion of the property, and in such an action the defendant may be imprisoned.

The Factors' act, in this State (N. Y.), distinctly gives to a third party who makes a loan on merchandise thus consigned a lien to the extent of his advances.

In regard to negotiable securities, the same rule has been held to apply without any legislation. Parsons on Contracts, vol. 3, sec. 273, says: "As to pledges of bank notes, negotiable securities, indorsed notes, and other representatives of money, the pledgee who takes them in good faith will acquire a lien, whether the title be in the pledgor or not." It is said that this will be disputed, but we do not believe that it can be overthrown. We do not see how society can be held together under present methods of business, if the protection of every one who loaned on negotiable securities depended on the title of the pledgor to the property on which the loan is effected. There are a hundred millions loaned in New York to-day on the pledge of negotiable collaterals. The title to such securities passes by acquisition in

good faith for value. If a man steals such securities and sells them, the purchaser, who has no notice of the theft, or reason to suspect the wrongful acquisition, acquires a perfect title. If the mere fact of possession will justify a sale so far as to give title to the buyer, it must be held to justify the pledge so far as to cover an advance made in good faith upon the securities, and the lender can enforce his lien.

16. Are we liable in case of fire for goods we may have on memorandum?

A. The bailee in this case is only liable for proper care and diligence. If he has fire insurance applicable to such goods the owner can recover his proportion of the amount collectible under such a policy. Whether he is liable if he has no insurance that would apply, is a question of custom and agreement.

17. If we take into our malt house a lot of barley to be malted for another person, where nothing has been said about insurance, if the malt house should burn down would we be liable for any damage? of course all our material is insured.

A. Factors and other depositors for hire are not bound to procure insurance upon the thing bailed, without some authority, expressed or implied, from the employer. (Story on Bailments, sec. 456; Jones on Bailments, 102.) In bailments for work or custody, as in the above case, if the property is destroyed by fire or otherwise, without the fault of the bailee, the loss will fall upon the bailer. But this responsibility may be controlled by the special contract of the parties, or by the usages and customs of the trade or business. (Redfield on Bailments, sec. 691.) Therefore, if it is a custom in the trade for the bailee to insure under the circumstances stated, without instructions, he would be liable for the loss in case of fire; if the custom is otherwise, then he would not be liable.

18. We consigned some goods to a party in West Virginia. We did not hear from him for a while, and then when we asked for a settlement of account he wrote us that our goods were burned with his own two months before, and adds: "As these goods were yours and not mine, not subject to levy for my debts, I must respectfully decline to acknowledge myself in your debt. The goods were consigned me for sale on your account." Those goods were consigned, it

is true, but we never had been apprised of the fire, neither do we know if they have not been saved, as our goods are not of a perishable nature. Have we any rights, if the party is good?

A. We cannot blame our correspondent for feeling aggrieved that two months should elapse after his property was burned before he was informed of it, and then only when he asked for payment. He certainly has the right to investigate, to inquire why the goods were not insured, or if insured and destroyed, who recovered and pocketed the money. If suit is brought against the West Virginia consignee he will be compelled to prove the loss, without his own fault, before he can evade responsibility.

19. Goods are consigned to us by a manufacturer on which we advance a certain amount. We afterwards find imperfection in the goods, and the manufacturer makes an arrangement with one auction house to receive the goods from us and pay us, as advanced, a certain sum, covering our advance and our expenses on the goods. The goods are finally sold by the auction house for a sum less than the amount advanced to us. Can the auction house hold us responsible for the deficiency, or will they have to look to the manufacturer with whom they made the arrangement, we having no funds belonging to said manufacturer left in our hands?

A. If the whole story is told, the auction house has no recourse to the commission merchant for any deficiency, but must look to the manufacturer.

20. Is it not by commercial usage the duty of a consignee to insure goods consigned to him against fire, in the absence of instructions to the contrary, from the consignor? If he neglect to do this, and the property be destroyed by fire, would he not render himself liable?

A. It is the custom of commission merchants to insure consignments likely to remain any time in store, even without instructions to that effect. But this is done as much to protect the interest of the consignee as of the consigner. In the absence of a previous usage to this effect between the same parties, or some expressed or implied directions in regard to it, a consignee would not be held liable if he omitted it.

21. A miller places several hundred barrels of flour with a commission merchant on consignment. The merchant sells, renders sales, charging usual commission, storage, &c. In delivering the flour four barrels are found badly damaged by rats; loss say \$2 per barrel. Upon whom should this loss fall, on the merchant or the consignor?

A. Unless it be shown that the damage is the result of gross carelessness on the part of the merchant, the loss falls on the miller. When Texas was an independent republic, the account of sales received by a shipper from that quarter always had a deficiency charged to "ratage." Flour, pork, beans, fruits, all fell short owing to the supposed depredations of the rats. At last a shipment of 100 kegs of ten-penny nails fell short two kegs from "ratage," and the shipper closed his account.

22. Will you be kind enough to inform me if a party in California sends me a consignment of wine and brandy of his make, if I am obliged to get a license before I can offer it for sale?

A. No person can engage in the sale of either foreign or domestic wines or liquors without paying a special United States internal revenue tax either as a wholesale or retail dealer according to the quantity in which he proposes to sell it.

23. Is it safe to make advance on consignments which came from a reputable source, although the consignor may be but the agent for the owner of the goods?

A. If our correspondent means to ask if it is absolutely safe to advance upon goods without knowing whether the person who receives the money has the legal right to pledge them, we answer in the negative. An agent may have power to handle the property of his principal without the right to sell or pledge it. In such a case the consignee would have no legal lien on the property for his advance.

24. If an assignment of flour, shipped — in the regular way, arrives here, inspects unsound, and is sold by the consignee, in the absence of specific instructions, at full market price, can the consignor claim a difference between the selling price and the price of the same brand when sound, on the ground that he has a right to know how the flour inspects before it is sold?

A. If the consignor limits the price, and the consignee has made no advances, the latter has not the right to sell below the limit without communicating with the former. But if no limit is affixed to the invoice, and in any case if the consignee has made advances, he has the right to sell at the market price.

25. A commission merchant hypothecates goods he holds on consignment upon which he has made no advance, and gets a loan for his

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own benefit. The commission merchant fails; can the party making the loan hold the goods against the owner?

A. The Statutes of New York, vol. iv, page 462, expressly give to the consignee of any goods "for the purpose of sale" the right to make a valid contract "with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." In plain terms the right to sell gives the right to hypothecate, although the consignee may have made no advances; and the loaner who takes a lien on the property as his security is not affected by the fact that the consignee or commission merchant has obtained the loan for his own private needs.

26. I received a lot of goods from a manufacturer on consignment on which I advanced nearly their full value.

The manufacturer has made an assignment and I have received a letter from a lawyer informing me that I must not sell the goods except by order of the assignee.

Have I not the right to sell the goods so as to recover my advances, or must I await the assignee's pleasure and be restricted by such conditions as he may see fit to impose?

A. "The assignee has authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrances." (Section 5,066.) Under this clause of the law, the creditor will have to wait on the assignee a reasonable time. Probably it would be best to give him notice of claim to be repaid the advances, or allowed to sell the goods, and if he should delay unreasonably, the Court, on application, would most likely afford the creditor relief.

27. A commission house has a line of our goods which they sell for us against a commission in their own name, but for our risk. In January they sent us upon our request a statement of stock on hand, in which we find some goods short, in regard to which they write to us "that they have been stolen from their store in October last by some sneak thief, whom they were not smart enough to catch," and regret-

ting at the same time our loss. This was the first information which we received that any of our goods had been stolen. We are, and have always been, of the opinion that the house is responsible for our goods as long as they are in their hands, which they, however, deny, and refuse to pay for the goods stolen.

A. It is a well known legal principle that a bailee is not responsible for the loss of goods occurring in spite of due diligence in their care and protection. Commission merchants, as a rule, do not avail themselves of this principle to free themselves from responsibility for missing goods ; and it is a question whether "due diligence," while it may not protect the goods from downright robbery or burglary, is consistent with their purloining by a sneak thief. The question of proper care is one to be settled in each case by the facts in evidence.

28. We send account of sales to a shipper for goods sold for his account, and write on the sale "Net proceeds to your credit." This shipper takes the sale to a bank and they cash his draft on us for the net proceeds of the sale. The draft is presented to us and we refuse to pay it, as the said shipper is in our debt, after having placed the net proceeds of this sale to his credit. Can the bank compel us to pay the amount ?

A. The above is not an agreement to accept or cash a draft for any given amount, and only such an agreement can render the drawee liable to the payee in case the draft is refused.

29. 1. In case of a commission house taking an order for future delivery and the manufacturer refusing to make the goods.

2. In case of the above order, and the price advancing, the manufacturer refusing to deliver goods at the lower price.

3. In case part of the goods delivered from stock and the manufacturer asking an advance price for the balance of the order. In the above cases how far is the commission agent responsible for the manufacturer's shortcomings ?

4. What is the difference if the above orders are accepted in writing or are only verbal, the facts not being questioned ?

A. 1. A commission house which accepts an order of this kind binds itself to deliver the goods at the price specified, and is liable to the buyer for reasonable damages in case of failure. How far the manufacturer is also held will depend on the question whether the commission house acted within the scope of its authority.

2. The goods are to be delivered and paid for at the contract price without regard to the state of the market.

3. The commission agent is bound to see that the entire contract is performed.

4. If the contract is merely verbal it is not binding in law until some consideration has been received, or part of the goods have been delivered. But that will make no difference we should hope, with any commission merchant in New York. There may be a dispute as to the terms of a verbal contract; but if the terms are admitted by both, the man who is able but unwilling to keep his word because he is not legally held for it, would steal if there was no law against it.

30. A commission agent in the city sells the goods of a country manufactory for which it is agreed he shall charge 5 per cent. on the gross sales commission, and 3 per cent. for guaranteeing the payments. In course of time the commission agent fails, and in settling up his bankrupt estate the manufacturer is charged with the 3 per cent. for guarantee.

Is the agent entitled at law to any of the guarantee money unless the account is fully adjusted?

If entitled to the guarantee money on any of the account is he entitled to it on that portion which he fails to settle?

A. The manufacturer's account is subject to the charge for guaranty, although the guaranty proved to be of little value.

31. H., of Augusta, contracts with L. & W. of Boston, to sell goods of their manufacture for a certain per cent., and he (H.) agrees to advance his note for one-half of the value, and to make cash advances for about one-sixth of the value to cover expense of freight &c. There is a clause in the contract which says "if any stock should remain unsold (at the end of the season) the same continues to be the property of L. & W." A portion of the stock does remain unsold, and is withdrawn by the manufacturers (L. & W.) from his (H's) possession. Is H. entitled to any commission on the portion withdrawn, and how much? or what proportion of the original commission?

A. The New York Chamber of Commerce in the rates of commission published annually under its authority decides in case of such withdrawal that full commission shall be allowed up to the extent of the outstanding advances, and half commission on the remaining value of the consignment withdrawn.

32. A Liverpool commission house telegraphs us offering to guarantee 11d. for a certain grade of goods; this house obtains 11½d. Should the account sales be rendered as at the former or the latter price?

A. If the house receives the goods on commission, the guaranty of a certain price does not authorize the consignee to return sales on that limit provided the goods are sold for more. The account sales must be for at least the amount guaranteed, and also for as much more as the goods may bring.

33. If a firm of commission merchants dissolves co-partnership, and there remain on hand at time of dissolution certain consignments which the consignor desires should be turned over to A, the one partner, can B, the other partner, claim any commission on these when they are sold or before; in fact, is B entitled to any compensation of commission on such consignments?

A. The firm of A & B can claim, according to the Chamber of Commerce rules, full commission to the extent of their advances, and half commission on the remainder of goods withdrawn by consignor. Of course B can exact, if he chooses, his share of such a claim.

34. A B of this city consigned for sale — hhds. tobacco to C D, a factor in your city, and drew against them. The factor sold enough tobacco to reimburse himself for advances and then failed, making an assignment. Without the knowledge or consent of the owner and consignor here he hypothecated the tobacco for money. The owner here owed him nothing when he failed except perhaps an item of freight; now, can he, the consignor here, claim and obtain the tobacco in kind from the assignee in your city? If not, upon what principle of law, justice or equity can the property of the consignor here be taken and applied to the payment of other persons' debts? This is important; for if it can be done in your city and State (N. Y.), Western shippers have no security and ought to know it at once.

A. The unrestricted right to sell always includes the right to hypothecate. It is better for the owner that the consignee should hypothecate for less than value, than that he should sell outright, and put the money in his pocket, for the consignor can now recover his property by repaying the advance. It is a very plain principle of law that the consignee of goods taken to sell on commission may borrow money on them, and if any one should suffer by his act, it is certainly equitable that the con-

signor who trusted him with so much property without any security, should stand in the gap.

The law of this State (N. Y.) provides that every factor or agent who shall be entrusted with any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof so far as to give validity to any contract he may make with any other person for its sale, or disposition of the whole or part of it for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

35. S & Co., of London, desire to represent in their city the firm of A & Co., of New York, stating that they are acquainted with the business in which A & Co. are engaged, and that they can get orders for the goods produced by A & Co., etc. A & Co., after ascertaining that S & Co. are in good standing, give them the desired agency, and at their solicitation authorize them to charter vessels to be loaded with such goods as they can sell. In due time they charter and send over three vessels, directing A & Co. how to load them. The first two vessels arrive and are promptly loaded according to instructions; cargoes go forward and are sold satisfactorily. The third vessel arrives, and it is found that the cargo ordered cannot be loaded in her, by reason of her peculiar build and formation, which is of iron and without ports, which makes her entirely unsuited for the trade in which A & Co. are engaged. A & Co. not wishing to embarrass S & Co. by declining to acknowledge the charter, cable them the situation, and S & Co. send back instructions how to load, which instructions A & Co. comply with, thinking, however, that their goods will be badly damaged, if not made unsalable, by the handling necessary to get them in said unsuitable vessel, but trusting to the judgment of S & Co., and as the best way to get out of the trouble, cargo goes forward without instructions from A & Co. S & Co. store it, where it remains for several years. S & Co. report that it cannot be sold because goods are unsuited for the market. It is finally sold at a heavy loss. Meanwhile A & Co. ascertain that while S & Co. are honorable men and in good standing, that they were not acquainted with the particular branch of business done by A & Co. Therefore A & Co. claim: 1. That the unfortunate charter was made through want of knowledge on the part of S & Co. as to the kind of vessels required. 2. That they (A & Co.) would have been justified in refusing to acknowledge the charter, but did acknowledge it and load vessel, only to save the credit and standing of S & Co. 3. That on arrival cargo was stored for several years, until the charges amounted to the value of it through the want of knowledge of the business by S & Co. 4. That as the loss all arises from the unwise action of S & Co., that they should stand the loss. Are we right or not?

A. If S & Co. were very sensitive to moral obligations they might, and probably would, feel compelled to contribute part or all of the loss sustained in the matter, but as we understand the relations of the parties from the above story, the London agents are not legally bound to bear a dollar of the burden entailed by their want of judgment in the premises.

36. A consigns to B (who is a commission merchant) 100 barrels of flour on sale ; if B sells the flour and appropriates the funds in his business or otherwise, and fails, is he liable to a criminal prosecution for such appropriation ?

A. A commission merchant, in this State (N. Y.), who fails to pay his consignor, but has otherwise conducted his business fairly and with no intent to defraud his creditors, is not liable to criminal prosecution.

37. We sell for a manufacturer say a certain amount of dry goods on commission, giving him our notes as advances on the same. We also sell to him direct the raw material, taking his note in payment. Suppose the manufacturer should fail, the query is, whether our notes given him, being advances on merchandise consigned to us, could offset what notes we held of his, whether he is in bankruptcy or not ?

A. As between the two parties, notes or other claims legally due from either side, and held by them, may be pleaded in offset when it comes to a settlement. But if the notes are negotiable, and the manufacturer, as is most likely, has passed the merchant's obligations to other parties, our correspondent will be obliged to meet his own notes and will not be able to collect the debt from his insolvent consignor and customer. The better way, therefore, is to advance the supplies instead of notes, and then the goods consigned will afford security.

CONSIGNOR.

38. B having failed, made an arrangement with C who agreed to execute the orders for shipment of cotton and grains which B was in the habit of receiving from D, his special agent in London. It was further agreed that the commissions on the shipments would be equally divided between B, C, and D. The orders obtained from different parties in London were taken by D in C's name, but always addressed to B. After several shipments were effected, D proposed to C to do the business direct with him, and the proposal was accepted. B claims now his share of commissions from C on all business transacted under the new arrangement, alleging that it was through him that C became

acquainted with D. C resists the claim on the ground that it was not he but D who proposed the new arrangement. Which is right ?

A. If C, on receipt of D's proposal, went directly to B and terminated the first engagement, he has a right to go on with the second without sharing his gains with B ; but if he went on with the business, leaving B to infer that the commissions were to be divided, the latter had the right to expect his share.

39. A is a commission merchant in New York holding goods on consignment from B ; if A does not pay his rent or should fail, are B's goods subject to attachment or levy for payment of A's rent or other debts ?

A. A's goods are not subject to B's debts, unless it may be for taxes on real estate, and all the property found on a place is liable to be seized for this obligation.

40. A ships a thousand barrels of flour to B, and B gets the necessary funds from the bank to make the agreed advance of three-quarters of value on bills of lading, which are changed for warehouse receipts on arrival of the flour. B meantime makes an assignment to a creditor of remaining one quarter, which A claims as his property. Who is the owner of balance of one quarter when the flour is sold, A or the creditor ?

A. If B hypothecated the flour or obtained an advance upon it, the lender would have a lien upon it, in this State (N. Y), since it was in B's custody with full power to sell ; but an assignment to cover a previous debt would only carry B's interest to the assignee, and would not transfer A's title. Hence A, in such a case, by reimbursing advances and charges, can resume possession.

41. What is the customary charge when an account of a manufacturer of dry goods is changed from one commission house to another ?

A. The rule adopted by the Chamber of Commerce establishes full commission on the value of the goods withdrawn to the extent of advances made, or obligations incurred, and half commission on the remainder. The custom is widely various. On valuable dry goods, not too bulky, $2\frac{1}{2}$ per cent. on advances, and 1 per cent. on the remainder, is the more common charge. But in bulky goods of low cost, the latter rate is not sufficient to give

a fair remuneration ; and if the house relinquishing the account has spent any time upon the goods withdrawn, although without selling them, it is certainly entitled to more than this.

42. Where goods are consigned and advances made, what are the legal charges to be made when consignor transfers the goods ?

A. The legal charge is only what is customary and reasonable ; and this is not regulated by statute. The Chamber of Commerce have established rates recommended by this body, and in the absence of agreement or other modifying conditions these would govern in a suit at law. In this table, to be found in each annual report, the Chamber authorize a charge of full commissions to the extent of all advances and obligations incurred, and of half commissions on the remaining value transferred.

43. One of our consignors who has had large advances on his goods, desires to transfer the balance of his stock to another commission house. His goods are irregular and liable to be claimed on. Several cases we have sold remain unpaid for. On whom have we redress in the event of just claims, we having delivered the goods as requested to our neighbors, receiving their check for advances and charges ?

A. Whatever legal recourse our correspondent may have from just claims to be allowed must be referred to the owner and not to the new agents. He has no claim upon them unless they voluntarily assume the responsibility.

44. I am a manufacturer, am placing my goods in the hands of a party to sell for 5 per cent. commission, I assuming all risks of the accounts. Should the party selling my goods fail do I come in as the rest of the creditors, or is the concern bound to pay me in full ? The goods are invoiced by this party as his, or upon invoices bearing his name. Again, should the party advance me money on my goods and fail before the sale of the same, does it in any way prevent my collecting the full amount due me ?

A. It is now settled that the sum due from a commission house to his consignor is to be classed with other obligations in the division of a bankrupt's estate. If the debtor has part of the goods on hand on which advances have been made the owner can take them back, repaying whatever is due the estate.

45. A imports ten cases of a fabric for B. who agrees to pay him 2½ per cent commission on the cost of the goods laid down here. The goods were imported and a duty of 35 per cent. was imposed by the customs authorities, after due examination by appraisers, entry duly liquidated, cost made up, to which commission was added, and B paid A for the goods. Six months after the United States makes a claim on A for an additional ten per cent., on the plea of an error by the appraiser as to component parts of the fabric. A therefore makes a claim on B for the ten per cent. B denies his legal liability to pay any sum beyond that first paid. The question involved is, is B legally liable to A? By the peculiar equity of the United States customs I believe A is liable for that ten per cent.

A. The contract having been based on the cost of the goods laid down here, a settlement founded on a mistake as to the cost can be reopened and adjusted according to the fact. The imposition of additional duty after account rendered is equivalent to a mistake in the reckoning. A's claim against B for the additional payment is not "legal" in the technical sense, because such readjustments belong to equity jurisdiction; but as the same courts in this State (N. Y.) exercise both law and equity powers, this is a distinction without a practical difference. We think B must pay the claim.

46. What status have goods which are sent on memorandum to a merchant who subsequently fails, and who claims the same had been sold by him, although the sender had not rendered a regular bill of sale for the same at the time of failure?

A. The usages of the trade in this city (N. Y.) regard the property, in memorandum sales, as remaining in the seller, but if, as in the above case, the buyer has actually parted with the goods to a third person, we think it would be difficult to support this understanding in law. As, between the original seller and buyer, the title would probably be held to remain in the former, according to the implication of the memorandum, until transferred by the rendition of a regular bill of sale, or the charging up of the goods.

CONTRACTS.

1. A writes B for his price of certain goods. B replies 50 cents. A replies it is too high, and offers 48 cents. B replies, declining the offer and holding at 50 cents. A finally writes B, accepting the goods at 50 cents, but in the meantime B had evidently reconsidered the matter, and wrote A accepting his offer of 48 cents. The letters

crossed each other, reaching their destination on the same day, although A's was dated one day before B's.

A. The precise case here described is not considered in the latest American Edition of Benjamin on Sales, and it is a moderately reasonable inference that it has not been adjudicated; facts necessary to constitute a contract by letter are there discussed at some length, and the author of the treatise is well informed respecting the decisions on both sides of the water. From the two leading English cases of *Cook vs. Oxley*, 3 T. R., 658, and *Adams vs. Linsdell*, 1 B. & Ald., 681, Mr. Benjamin deduces this conclusion, viz.: "That a contract becomes complete only when the mutual assent of the parties concurs *at the same moment of time*; and that no number of *alternate* offers and withdrawals, refusals, and acceptances can ever suffice to conclude a bargain." Mr. Benjamin remarks that "the cases that arise in attempts to contract by correspondence present at times very singular complexity," and the case before us is one of these. If A's acceptance had been mailed a day in advance of B's reconsidered offer, we should say that his acceptance closed the contract, and the reduction subsequently offered by B, without knowledge of the previous acceptance, would have been without consideration and not binding on him. After considerable study of the difficulties surrounding any other solution of the question, we are disposed to believe this must be the conclusion as it stands; that the contract was closed at 50 cents when A's acceptance was mailed, and B's later offer must be ruled out altogether.

2. A mails B a letter saying "I accept your offer." Before B receives the letter he gets a telegram from A saying "I will not accept your offer. I hereby cancel my letter this date." Can B hold A by the letter.

A. The telegram duly delivered before the letter, recalls and cancels the letter.

3. In consideration of a certain sum of money, C & Co. agree to furnish and set in a building one furnace with the necessary registers, tin pipe and smoke pipe, for B & Co. The walls of the above mentioned building were partially completed, when a gale blew down a portion of the same, thereby destroying part of the hot air pipes. O

& Co. replaced the damaged ones and now send in a bill for extra pipe, which B & Co. decline to pay, claiming that the destruction of the walls was an act of Providence, and that they were not liable for any damage done to C & Co's materials until the entire work was finished according to contract. State if C & Co. can collect their claim?

A. If the walls were not negligently constructed or left without protection, B & Co. cannot be obliged to make good the loss of C & Co., it having been caused by inevitable accident for which no one is responsible. Thus, where a mill-dam was built upon a proper model, and the work was faithfully done, yet it broke and destroyed a neighboring dam and mill, the owner of the first dam was held exempt from liability. (*Livingston vs. Adams*, 8 Con., 175.) B & Co. are therefore right in declining to pay for the extra pipes unless they can be justly charged with negligence.

4. A house buy through an agent of a New York house some goods. The agent on the same day writes to the New York house that he has sold (no contract being made) so and so, but the firm answer back by return mail that the goods are not to be had in the market, and offer other brands in the same lines at lower prices. The house here do not want them, and claim damages on the ground that the goods were worth more. Can they be successful (under the circumstances that the goods were not to be had and not prices put on it) if they bring suit against the agent or the New York firm?

A. If the agent made a legal contract to deliver a certain description of goods, then the purchaser can tender the payment and demand the delivery. If the agent was unauthorized to sell, he can be held, although the house could not. But without any legal contract a verbal acceptance of an order would create no legal obligation, and under the circumstances, no moral obligation on the part of either agent or principals.

5. I make a contract for three monthly shipments of goods by sail from Providence to Liverpool, beginning in March. Now I put the goods in Providence ready for delivery in March, but no vessel can be secured to take it; consequently I put the March and April shipments together and ship in April. Does my failure to ship in March release the buyer from his obligation to take the goods? Or is the contingency of securing a vessel implied in a contract to ship by sail?

A. The contract is broken by the failure to secure a vessel. The seller undertakes not only to have the goods ready for ship-

ment, but also to ship them, and this is an agreement that a vessel shall be found to take the cargo.

6. An owner of a sawmill having cut up some logs in boards wishes to get his pay, but the owner is not responsible. Now can the sawyer hold the lumber as against the owner or against the claims of his creditors, on the principles of the mechanics' lien. How can he raise the money from the lumber if he can hold? Can he sell? If so, under what process? Can he put up the lumber to save it from decay and get his pay for his trouble?

A. If the sawyer has the lumber in his possession, as we infer from the statement, he can hold it until he is tendered the cost of his labor upon it. If this is not done as soon as he desires, he can notify the owner to pay him his charges and remove it. If the owner declines, he may take care of it at any reasonable expense; but we doubt whether after suitable notice to all concerned he may sell enough at public sale to reimburse himself. Story says: "A mere right of lien is not understood to carry with it any general right of sale to secure an indemnity." And in a note: "We think the rule is generally stated by the text writers, that a party having a lien only, without a power of sale super-added by agreement, cannot lawfully sell the chattel for his reimbursement." Story on Bailments, 311, and note.

7. I have read that "contracts made on Sunday cannot be enforced," and that "a note drawn on Sunday is void." You will greatly oblige a reader by stating if such is the law.

A. A contract which is made in violation of the express provisions of the Sunday laws, in any state, is void, like any other illegal or prohibited contract. The laws differ in different states, and that which is illegal in one state may be legal in another. In this state (N. Y.) a contract which has for its consideration the doing of ordinary work or labor such as is forbidden, would be void; but in *Boynton vs. Page*, 13 Wend., 425, it was held that a *private* transfer of personal property, or any "mere private contract" which did not violate the Sunday law, or tend to produce a violation of the public order and solemnity of the day, is not void. A promissory note dated on Sunday, if not signed and delivered that day, is valid; and if actually signed on Sunday, it has been declared to be valid, no matter how stringent the Sunday law, if delivered on a secular day.

8. A broker sends us a contract (by his boy,) we take it, but do not mark it "accepted," nor are contracts exchanged with the party from whom the goods are purchased.

Does our taking the contract signify our willingness to abide by its terms, or must it be indorsed and exchanged?

A. "The broker's signature to the notes will satisfy the statutes." "It is not uncommon for the principals to sign their approval upon the note to be handed to the other party, but this, although convenient as settling the question of the broker's authority, is not necessary to give validity to the contract if the broker's authority can be shown by other means." "By retaining the note without objection, either party ratifies the contract set forth therein. By returning it at once, with his dissent, he repudiates the contract; and his liability then depends, not upon what the broker has done, but upon the authority which he actually gave to the agent." In the case cited our correspondent retained the broker's memoranda without objection, and is as liable as if he had written the word "accepted" upon it and returned it.

9. Can damages be recovered for violation of a verbal contract or agreement?

A. Where a verbal contract is legal and binding, and can be proved its violation is subject to the same penalties as the violation of a written agreement. In this state (N. Y.) a verbal contract for the sale of goods for the price of \$50 or more is void unless the buyer accepts delivery in whole or part, or makes part payment, or gives memorandum in writing.

CORPORATIONS.

DIRECTORS—OFFICERS—STOCKHOLDERS.

1. Is it necessary that the president and treasurer of a company organized under the law of the State of New York, dated February 17, 1848, and amendments to the same, should be residents of the county and city where the principal or financial office of the company is located. The factory of the company is located in another State. Also, is it necessary that the books of the company should be kept at the principal office in this State, or can they be kept at the factory? I have consulted two lawyers regarding the above, but they are not clear in their answers, except that they say the books can be kept at the factory.

A. In order to incorporate under the act it is necessary that a majority of the trustees shall be citizens of this State. (Section 3, act of 1848.) If in addition it is intended that part of the operations of the company shall be carried on in another State or county, then the president and treasurer must also be actual residents of the town or city in which the principal office of the company within this State is located. (Laws of 1861, chapter 170, section 2.) At this principal office must be kept, open for inspection every day except Sunday and the 4th of July, the book containing the list of the shareholders. (Section 25, act of 1848.) There is no requirement as to the company's books of account, which may therefore be kept at the factory or elsewhere, at pleasure.

2. Please let us know in what cases directors in stock companies in New Jersey and New York are liable for the debts of the concern?

A. In this State the stockholders are liable in all cases unless such liability is limited by some particular statute. In banks they are liable for an amount equal to their stock. In certain joint-stock companies they are not liable if the stock was duly paid in, and the concern is legally managed. But the question is too sweeping for a specific answer. In New Jersey the field is equally wide.

3. Please inform me as to the liability of a director, bond and stockholder in a mining enterprise organized under the laws of the State of New York. The stock is unassessable. In case the enterprise should prove unsuccessful, I would like to know what would be the responsibility of a party holding above conditions, if the company should contract debts, etc.

A. If the stock is all paid up, the annual statement duly published, and the law fully complied with in other respects, there need be no special liability in the cases described. The bondholder would only be liable to lose his investment. The stockholder and director may each be liable in certain contingencies hinted at above.

4. A mining company is incorporated here under the laws of this State (N.Y.) in 1863, for 40 years. It became defunct in 1869, so far as defrauding in the payment of interest on its bonds and closing its office, and returning the mining property it held to the original owner

up on his giving to the officers certain bonds. The officers failed to comply with the law relative to filing annual statements, and before closing their office here the trustees made and filed a certificate representing that the capital stock had been *fully paid in*, whereas only a part had in reality been paid, it is believed. The books and papers of the company have been carried away and no report ever made to the stock or bondholders. Are the trustees, who have since lived in Pennsylvania, still liable to the bondholders in a penalty as prescribed by statute for neglecting to file the statement of the company's affairs as required, by suit brought there, or does the statute of limitation bar an action? Could an innocent holder of these bonds who had been deceived in regard to the certificate stating that the stock had been fully paid in, and of the statement of the secretary that "the bonds are good," after the fact of their default, etc., have the trustees extradited for fraud? What is the best course to be pursued in reaching the trustees under these circumstances?

A. Through the lapse of time, no criminal action could now be maintained, and therefore the extradition of the parties could not be demanded. In all probability the civil remedy is also barred by the statute of limitations; though if the trustees have resided continuously without the State since their liability accrued, or the fraud was discovered, and could now be served with process within it, they might be made to respond. Proceedings in Pennsylvania are barred by the statute of limitations in that State.

5. Can a deed from a company, signed by the president, be acknowledged before a commission or notary who is an officer, treasurer of the company? Will it make any difference whether or not the notary is a stockholder in the company?

A. Proffat, in his work on Notaries, states the rule to be that "where the officer is a party in interest he cannot take the acknowledgment." An officer, member, or stockholder of a private corporation has been decided to be a party in interest, and prior to the change in our State law (N.Y.) permitting parties to testify, could not be admitted as a witness in a suit to which the corporation was a party. The statute, however, merely removes the disqualification as witness, and if Proffat is correct in his statement, the incompetency to act officially as notary or commissioner would seem still to exist, though we cannot find that the point has been directly determined.

6. If the president of a company organized under the manufactur-

ing and mining laws of 1848 should sell, assign, and convey all its property and assets, and thereby inflict political death upon it, without the knowledge or consent of a single trustee, director, or stockholder, would such sale and assignment be legal or wholly illegal?

A. A conveyance by the President of the property of a joint-stock company, giving a *prima facie* title to the purchaser, may be perfectly legal. Section 3 of the act of 1867 provides that conveyance of real estate, etc., shall be made to the president, and "such president, and his successors from time to time, may sell, assign and convey the same, free from any claim thereon against any of the shareholders, or any person claiming under them, or any or either of them."

7. Is there any law providing for the publication of the names of the trustees or directors of life insurance companies and other corporations?

A. There does not appear to be, in any of the statutes authorizing the formation of corporations, any provision intended to keep the public informed relative to changes in the boards of directors or trustees. In the case of insurance companies the law passed prior to the existence of the insurance department required the names of the original incorporators to be filed in the comptroller's office, and published in the State paper. In the general acts relating to mining, mechanical, and miscellaneous corporations, the names of the trustees for the first year must be filed in the offices of county clerk and secretary of State, and thereafter the annual reports, to be likewise filed, must be signed by a majority of the trustees. But if only a majority sign, there does not seem to be any method except such as the law provides for procedure against unknown defendants, to ascertain the names of the other trustees. In a suit, no doubt the court would require an exhibition of the corporation books, but as the enabling acts all contemplate the individual liability of trustees or directors in certain cases, it is a manifest oversight that there should be no readier way than this of ascertaining who the individuals are in case of an attempt at concealment as described above.

8. In the first week of January, 1879, a stock company, electing one of its trustees as secretary by ballot, at a certain salary for one year, now find that it is better for the interest of the company, to have

another in his place. In case he refuses to resign, how may his removal be effected? If it could be shown that he had not kept the books of the company, but has hired another to do the work, removing the books from the office, would that not be sufficient cause? The company also find that he is subject to epileptic fits, and he carries the keys of the safe and office door, thus liable at any time to put the company to great inconvenience, if not loss, by having the keys stolen.

A. There are very few precedents for the removal of officers of private corporations, but unless there is some special provision in the charter, the by-laws, or the act under which the association is organized, the various decisions which have been made in the case of municipal corporations, bear against the sufficiency of the reasons above stated to constitute a cause for removal.

9. Is a person liable for the debts of a corporation if contracted after he has disposed of his stock? If so, how long thereafter will he be liable, and what means are there to stop the officers from bringing the company in debt at the expense of a non-stockholder?

A. Unless made specially liable by charter or other provision of law, a former stockholder would not be personally liable for debts contracted after he had disposed of his shares.

10. Can the stockholder in a company relieve himself from all liability on its account by making a transfer of his stock to the company while it is solvent?

A. The difficulty in determining the above question in a positive manner grows out of the silence of our state statutes on the point, and the fact that the precise case, being one not likely often to arise, has never to our knowledge, been litigated. The debts of solvent corporations are generally paid without giving occasion to such a controversy. But since a solvent company may become insolvent, leaving shareholders in the exact position stated by our correspondent, the question is one of interest. The matter of solvency at the time of the transfer aside, it has been held in New York that "if a charter provides generally that the stockholders shall be personally liable for the payment of corporate debts, and that persons having demands against the company, who have obtained judgment against the corporation, may sue any stockholder, the suit can only be brought against such as were stockholders when the debt was contracted, and not those who became so afterward." (Angell & Ames on Corporations,

sec. 617, citing *Moss v. Oakley*, 2 Hill, 265.) The question in this case arose under a charter, the personal liability clause of which was in the same indefinite form as to the point raised, as the similar clauses in our subsequent general acts. The point was decided in the Court of Errors (*McCullough v. Moss*, 5 Denio, 567). Senators Lott and Putnam, who gave opinions on the prevailing side, concurred with the view stated above, while Senators Barlow and Talcott, who voted with the minority, thought that only stockholders at the time of suit brought should be held. In Massachusetts and Connecticut, on the other hand, the latter opinion has been accepted, and shareholders at the time the debts were contracted, but who had transferred their stock before suit was brought, were held free from liability. (*Middletown Bank v. Magill*, 5 Conn., 28; *Child v. Coffin*, 17 Mass., 64.) The doctrine in these last cases, so far as bona fide transfers of stock in a solvent corporation are concerned, is so much more agreeable to equity than the other that we are inclined to think our own state (N. Y.) courts would distinguish the case presented from those previously decided and permit it to fall under the rule in Massachusetts and Connecticut. Where there is an evident purpose to defraud creditors by the transfer, however, we have no doubt the original stockholder will continue to be held to his liability.

11. Has a stockholder of a bank the right to examine the books and assets of the bank at the annual meeting of stockholders or at any other time, or is this an exclusive right of the directors of the bank?

A. We suppose the writer refers to the stockholders of the national banks. Every one owning shares has the right to inspect "the list of the names and residence of all the shareholders in the association, and the numbers of shares held by each," which must be kept in the office where its business is transacted. If any further examination is required, it is to be made by "a suitable person or persons" to be appointed by the Comptroller of the Currency, with the approbation of the Secretary of the Treasury.

12. A party holding stock in an insurance company or bank (not national bank) pledges said stock as collateral for a loan from the com-

pany or bank. At a meeting of the stockholders the party who has pledged his stock as above stated goes into the meeting, and is informed that he cannot vote stock so pledged.

A. Corporations are required to file a plan of incorporation, and the only regulation relative to voting shares is with respect to the first meeting for organization, at which, it is said, "the subscribers shall vote as prescribed in the plan of incorporation." Battle's Revisal Laws of N. C., tit. Corporations.

In *ex parte* Holmes, 5 Cowen, 426, the shares were held by trustees for the benefit of the insurance company, and the Supreme Court of New York said they could not be voted at all. "It is not to be tolerated that a company should procure stock, in any shape, which its officers may wield to the purposes of an election."

The joint stock companies in this state (N. Y.) are allowed by law to vote upon stock that has been pledged, but not transferred.

13. Do the first trustees of a company incorporated under the laws of this state (N. Y.) hold office for a year from the date of organization regardless of a by-law, subsequently adopted, fixing an earlier date for the annual meeting and election?

What is the legal notice, by advertising, required of such annual meeting?

Have stockholders a right to examine the stock ledger or transfer book of such corporation, the by-laws providing that books of accounts shall be open to such inspection?

A. The first trustees only hold office as long as the by-laws appoint, and the new board will succeed as these regulations prescribe.

The law prescribes that the election of trustees shall be at such time and place as shall be directed by the by-laws of the company; and public notice of the time and place of holding such election shall be published not less than ten days previous thereto, in the newspaper printed nearest to the place where the operations of the said company are carried on.

The law provides expressly for the stock register, which must show who have been stockholders of the company within six years, their place of residence, the number of shares they hold, when each became the owner of such shares, etc., all alphabeti-

cally arranged, which must be accessible to every stockholder, (and creditor too,) and their personal representatives, during the entire business hours of every secular day.

14. A stock company is formed with a capital of \$20,000 in 200 shares of \$100 each; 174 shares are placed: the remaining 26 shares are now held by the company, in the name of the president as trustee. Are these 26 shares entitled to a vote at the annual election of board of directors, and if so can the old board of directors instruct the president how to vote, or can the president on his own authority use these 26 shares to elect a certain ticket?

A. The stock cannot be voted. In two like cases the election of directors by stock thus held have been set aside by the Supreme Court. (*Ex parte Elipphars Holmes and 10 others*, 5 Conn., 46; *ex parte John B. Desdoily and others*, 1 Wend, 98.)

15. R. I.—What action is necessary to protect from personal liability the stockholders of a manufacturing corporation, working under a charter granted by the State of Connecticut?

Is the liability of directors and officers any different from that of stockholders simply?

Is there any provision of Rhode Island law whereby the interests and liabilities of stockholders, directors, or officers of a manufacturing company, located in Rhode Island, working under a Connecticut charter, the legal requirements of same having been fulfilled, could in any way be affected in case of disaster to the company?

Has a creditor of an insolvent corporation, operating under circumstances above stated, any claim upon anything beyond company's assets?

A. Under Rhode Island law the members of every incorporated manufacturing company are jointly and severally liable for all debts, until the whole amount of capital fixed by the charter is paid in and certificate thereof filed with the town clerk. The same liability exists in case the annual statement is not filed. The directors are specially liable if a dividend is declared and paid when the company is insolvent. The provisions of the act are not in terms confined to corporations acting under state charters, and it is presumed they would apply to a corporation working under a foreign charter. There is no Rhode Island law that we know of imposing special liabilities upon stockholders of such companies, and under the circumstances stated, the creditors can take only the assets.

Under the Connecticut Joint Stock Corporation Act, the stockholders are liable to creditors only when the capital has been reduced before the payment of its debts. Directors are jointly and severally liable, however, in case a dividend is declared when the company is insolvent, or the payment would make it so, provided they assented to the making of the dividend; and all officers are liable, in case they intentionally fail to perform any of the duties by law required of them, for all debts contracted during the period of such failure.

No action could be taken by any stockholder to defeat any liability thus imposed, except to keep watch and see that the law is complied with.

16. CONN.—Will you please give a synopsis of the Connecticut Limited Liability act?

A. The only individual liability of stockholders under the Connecticut Joint Stock Corporation Act appears to be in case of a reduction or withdrawal of capital when, if the corporation fails to pay any liabilities outstanding against it at the time of such reduction or withdrawal the stockholders may be held to pay in proportion to the number of shares. It is not required that any of the officers shall reside in the state, but if the secretary is non-resident the corporation must appoint a resident attorney upon whom process may be served. Annual reports must be made. Directors are individually liable in case of payment of dividend when the company is insolvent, and officers are also made so liable for corporation debts contracted at any time during which they shall fail intentionally to perform any of the duties required of them by law.

17. N. J.—What are the rights of small stockholders in corporations New Jersey, where the control and management is in the hands of a few? Can the small stockholders with a few shares demand an inspection of the semi-annual reports and take copies of them?

A. The New Jersey law does not, so far as we have ascertained, provide for the inspection by the shareholders of any other records of the corporation than the stock and transfer books. It does not seem to have been contemplated that the reports especially designed for the information of shareholders

should ever be withheld from them. In a proper case, however, no doubt the Court of Chancery would require the exhibition to be made.

18. N. C.—In 1870 the Legislature of North Carolina granted a charter to a bank called the "Bank of Statesville." The bank was never organized, nor was any record kept of the proceedings. But the cashier appointed certain gentlemen directors of the bank, and another he appointed president, and published the bank in the newspapers as "open and ready to transact banking business by taking notes for money loaned and receiving deposits." The gentleman who was appointed president and the directors knew that their names were so used, and the president, supposing the bank had been organized as advertised, took five shares in stock for which he never paid. Some time afterward the cashier died, and it was ascertained for the first time that there was no bank or organization, and that the cashier had been running on deposits. This was unknown to the president, who did not live in the same town, until after the death of the cashier. There are a great number of creditors and there are no assets in the bank with which to pay them. Is the president liable for the debts of the institution to its creditors? Should they succeed in making fraud appear in the president, would he be liable above the amount of his stock, or liable at all? Please give me your ideas on the liability of the president in any point of view, and if there are any decisions bearing on the point, please refer me to them, or any work bearing on the point.

A. If any personal liability on the part of the officers of the bank was created by the charter, or the general laws of North Carolina, there is reason and authority for the belief that it could be enforced, notwithstanding the fact that no organization was actually formed. "A defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his individual liability, as he has participated in the acts of user of the corporation *de facto*." (Eaton v. Aspinwall, 19 N. Y., 119.) In Dooley v. Cheshire Glass Company, 15 Gray, 994, the defense was that the corporation had never been duly organized, but the court refused to allow the proof. The principal of estoppel is sometimes equitable, as well as technically permissible, and this is such a case. The doctrine does indeed seem to have been somewhat doubted in Whipple v. Parker, 28 Mich., 269, but in Swartwout v. Michigan Air Line Railroad Company, 24 Mich., 398, it was held that there may be such an estoppel.

The charter of the Bank of Statesville, however, imposes no individual liability upon either officers or stockholders. (Private

Laws of N. C., 1869-71, chap. 64.) Neither is the general law of the State applicable to corporations, unless a personal liability clause is contained in the plan of incorporation ; but it is worth while to remember that the officers of an incorporation are personally liable on any contract over \$100, which does not state on its face whether or no individual liability exists in the plan of the charter. (Battle's Revisal, 1873, p. 266.)

We suggest, in default of any remedy in this direction, that persons professing to do business under a charter, not in force as to them or the business they are doing, are in reality simply partners, and liable as such. One of the objects of incorporation is to escape the personal liability which attaches to a partnership. (Angel & Ames on Corp., 41.) And if persons associated together in business fail, through their own neglect, to protect themselves by a charter, we do not see why their individual liability does not remain, as if no pretense of a charter had been put forward. Neither the president's ignorance nor his failure to pay for his shares would in our opinion affect his responsibility, except as bearing on the question of fraud.

19. OHIO.—The writer was the owner of \$1,000 of the capital stock of a manufacturing company. On March 25, 1875, the company issued bonds amounting to \$31,000 ; on January 26, 1876, Mr. Blank purchased the \$1,000 stock of the writer in full knowledge of the existence of the bonds, and after making inquiries of the officers of the company as to the probable condition of the factory. In the same year the concern stopped running, and the holders of the bonds have foreclosed, and the factory is to be sold by the sheriff for their satisfaction. The stockholders will be assessed for the payment of the bonds ; on whom will it fall, the writer or Mr. Blank ?

A. The Ohio courts say that a stockholder continues personally liable for the debts contracted while he was a stockholder, notwithstanding his transfer of the stock. (Wehrman vs. Reakirt, 1 Cinn. S. C. R., 230 ; 2 Cinn. S. C. R., 350.) Perhaps the precise question above stated was not so distinctly decided in the cases cited, as to place the matter absolutely beyond question, but they make it more than probable that our correspondent must bear the assessment.

20. W. VA.—A B takes five shares of stock in a building association (par value of shares of \$100 each), and from time to time buys

out \$2,000. Parties claim that the association, by selling him more than his stock, became bankers, and thereby render themselves liable to the usury laws, and that the transaction is invalid and can be repudiated by A B under the usury laws.

A. These transactions have been held usurious in Pennsylvania, Connecticut, Maryland, Iowa, North Carolina, and Ohio, and not usurious in New Hampshire and Massachusetts (*Reiser vs. Association*, 39 Penn. St., 187; *Building Association vs. Wilcox*, 24 Conn., 147; *Land Society vs. Taylor*, 41 Md., 409; *Mills vs. Loan Association*, 75 N. C., 292; *Building Association vs. Gallagher*, 25 Ohio St., 208; *Hawkeye Benefit, &c., vs. Blackburn*, Iowa Supreme Court, April term, 1878). The principle seems to be that where such associations are mere partnerships, and do not possess corporate powers, the transactions are permissible, otherwise they are usurious. The West Virginia Statute which authorizes the incorporation of homestead and building associations, however, expressly permits them to collect "premiums bid by members for the right of precedence in taking loans," and "the dues, fines, and premiums paid by the members of such corporations, although paid in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious."—Code of West Virginia, chap. 54, sec. 27.

MISCELLANEOUS.

21. Is a stockholder of an association liable for the debts of the same. The association has not yet taken out its charter. Is any officer liable for its debts?

A. Until an association has "taken out its charter" all concerned are liable for all the debts incurred.

22. How is a mining company organized under the laws of the State of New York (act of February 17th, 1848, and acts extending and amending the same), for the purpose of mining in Montana, and which requires two-thirds of the capital stock represented at any meeting to amend its by-laws, can dissolve and surrender its certificate of incorporation, for the purpose of reorganizing under the laws of the Territory where its property is located? What proportion of stockholders is required to give consent? How long notice must be given of intention so to reorganize, and what legal means can be resorted to to defeat the plan? Can the stockholders be compelled to surrender their original certificates, or can the bondholders intervene if their security after such reorganization is the same?

A. The laws specified above do not make any provision for

the dissolution of the corporations formed under them, and the previously existing law therefore applies. The New York Superior Court said, in 1855, that "no corporation can be dissolved by a mere resolution of its members or stockholders. It can only be dissolved by a judicial sentence or by a surrender of its charter, accepted by the State." (*N. Y. Marble Iron Works v. Smith*, 4 Duer, 362.) In an application to the courts, it would of course be required that all the interested parties should have notice, and an opportunity to be heard.

23. The directors of a railway guaranteed by indorsement the bonds of another railway, with which it connects, and sold such guaranteed bonds on the market for the purpose of obtaining funds to put the connecting road in good condition and equip it. After paying interest on such bonds for years, making annual reports to its shareholders of the receipts and disbursements on account of the connecting road, can the directors lawfully refuse to pay the interest on the ground that no consideration was received for said guaranty, and the stockholders never assented to it? In other words, can trustees, acting in good faith for a principal, have their actions sanctioned by that principal when it is supposed they will be ultimately remunerative and repudiate them when found otherwise? Has the question ever been adjudicated?

A. The facts stated will not prevent the legal repudiation of the obligation if there proves to be a legal ground for it. Concerning the immorality of the repudiation there can be no question.

24. Having lost or mislaid certificates of stock of a chartered company in this city, we would feel obliged by your informing us through your columns what is legally necessary to do to get new certificates.

A. Apply for a new certificate, and advertise the loss of the old, stating that application has been made for a new one. After a reasonable limit of time the company, on the filing of a bond in two sureties for its protection, will issue a new certificate.

25. When a corporate company has neglected for some years to pay interest on its bonds—coupons—is it liable for interest on the amount of the unpaid coupons from the time they were due, when no action has been taken in law to enforce the payment of the interest?

A. The courts have now decided that where coupons remain unpaid through default of the debtor, interest thereon may be collected as damages for such non-payment.

26. The New York Central and Hudson River Railroad Company have notified the owners of the property on the Hudson River, the roadway of said company on the East and the bulkhead line on the easterly side of the North River as established by law on the West, that said railroad requires the same for the purposes of its incorporation and for the purpose of running and operating its railroads.

If the owners or any of them decline to sell for substantial reasons, can the railroad compel them to sell or take their land from them through their power of eminent domain granted them by the State of New York?

A. The Court of Appeals have decided that the power of a railroad company to take land is the reasonable necessity of the corporation in the discharge of its duty to the public. And the court is to determine the necessity and extent of the appropriation of land by a railroad company under the General Railroad act. The course of the land owners, if they can show that there is no reasonable necessity for the appropriation, is to appear in court in opposition to the company's petition, of which they must be duly notified.

27. Is there any real difference in the value of convertible and consolidated bonds of Railroads? Are they not really two issues of the same mortgage? It is stated that the trustees of the consolidated bonds are about to foreclose, and we would like to know whether their action would protect our interest as holders of the convertible bonds, and if so would it be necessary to have our name as holders registered with the trustees of the consolidated?

A. There is no real difference between the convertible and consolidated bonds, as they are equally secured under the consolidated mortgage. The holders of the convertible bonds will be equally protected under the foreclosure if they will come into the arrangement, but they must sign the agreement with the holders of consolidated.

28. In an incorporated company or society consisting of fourteen members, where the by-laws say that a majority shall constitute a quorum for the transaction of business, can it be considered that a quorum is present when only four are present, though these four hold a proper proxy for the remaining ten?

A. If a majority of stock is required, a proxy will answer; but where a majority of members is required unless the by-laws specially provides that the attendance may be by proxy, the latter will not be sufficient.

29. Is it illegal in this State (N. Y.) for one or more persons to use for advertisement such name as say "The New York Manufacturing Company," as a means of advertising goods or wares without complying with the "Act to provide for the organization and regulation of certain business corporations" provided that no debts are contracted under the title, no lands or leases are held? In fact, the title of the company to be only the means whereby the goods are to be advertised—a trade name.

A. It is a penal offence for one person to assume the name of a partnership, or to use "Co." which represents no real partner. If a number of persons associate as a company and contract no debt under such a title, they would violate no special statute by using such a name.

CUSTOM HOUSE AND POST OFFICE.

CUSTOM HOUSE.

1. If imported goods are advanced by the appraiser, can the advance simply be paid under protest, in view of a future recovery, or is it necessary to appeal to a re-appraisement? In case such an appeal is necessary, when was such a decision rendered, and by whom?

A. An official appraisal, not appealed from, is conclusive as to the dutiable value of goods, except in case the protest points out a violation of law, in making the appraisal. (Roller v. Maxwell, 3 Blatch., 142; McCall v. Laurence, Ia., 360; Hertz v. Maxwell, Ia., 137; Schurise v. Maxwell, Ia., 408; Bartlett v. Kane, 16 How., 263.)

2. If goods are stolen from a bonded warehouse does the loss fall on the government, the warehouse, or the owner; or, in other words, is either the government or the warehouse responsible to the importer for loss so sustained? Does the government exact duty on goods stolen while in bond, and from whom?

A. The government declines all responsibility for goods in bonded warehouse. The warehouse is responsible unless the owner or lessee can show that he used due diligence, and that he lost possession without his fault. The government could exact duty under the bond, but the goods not being there to respond to the claim, it is hardly probable the bondsman would be prosecuted if the owner was not connected with their disappearance.

3. I import 20 casks of alcohol from Germany. I use the contents of those casks for manufacture in bond for export. After those casks are emptied I sell them for \$2.50 to \$3 each without having paid duty on them. Are those casks liable to duty under schedule H of the tariff, viz.: "Casks and barrels, *empty*, 30 per cent.

A. The casks cannot be withdrawn from bond and thrown upon the market without paying the proper duty.

4. If I buy a parcel of goods in a vessel just arrived from abroad and not yet entered at the Custom House, can I enter them myself, or can the collector insist upon that being done by the person who sells them to me?

A. The Secretary of the Treasury, Regulation 316, decides that "to prevent frauds arising from collusive transfers, all merchandise imported into the United States shall be held and deemed to be the property of the person to whom the merchandise is consigned, any sale, transfer, or assignment prior to the entry and payment, or securing the payment of the duties thereon, to the contrary notwithstanding. The intent of the law being to compel the original consignee to enter the goods, that intent would be defeated by allowing any other person to make the entry and take the necessary oath." This answers the question explicitly, and shows that the entry must be made by the consignee, or in his name and with his oath.

5. If we buy goods at the factory in England are we required to pay duty on the cost as invoiced from factory, or at the cost on board ship (say at Liverpool) as stated in the United States Consul's certificate or on the invoice, expenses added (freight, insurance, etc.), to the dock here? If so, is this by authority of law, or a decision of the Treasury Department?

A. The dutiable value of the merchandise is its market value at the port of export, but not less than its invoiced cost, commission added, whether paid or not. There is no duty on the freight or transportation. This is regulated by act of Congress?

6. A foreign house in Glasgow buy a lot of goods at 4½d. per yard, but before the goods are ready the price has dropped to 4d. The buyer wishes to consign them to a house in New York; at what price should he invoice those goods to pass the Custom House? On the day of shipment the market value is still 4d. per yard. The buyer does not want to pay more duty than what is right.

A. The purchaser must invoice them at cost, with commission added, but not less than the market price at the time and place of export.

7. We had to receive by a certain steamer 100 packages of goods which we entered in bond and gave the delivery order to the United States bonded warehouse. The Custom House weigher weighed the goods (100 packages) on dock; the captain of the steamer claims this to be a delivery while the warehouse claims to have only received 99 packages, and we as the owners of the goods refuse to pay the freight. Who is responsible for the one package missing?

A. If the official Custom House weigher received and weighed the 100 packages, this must be held to be a good delivery on the part of the vessel. The difficulty is that the Government refuses to be held responsible for goods lost while in its custody.

8. The revenue laws of the United States require that, before a vessel bound on a foreign voyage can clear at the Custom House, the cargo must be cleared by shippers. A vessel without lay-days loads for several parties, one of whom considers he has some claim against the vessel, and not wishing to resort to law, arbitrarily refuses to clear his part of the cargo in hopes of forcing the vessel to terms. What redress has the vessel, and is there no way for her to clear without shipper's clearance?

A. We have labored at this difficulty for years, but it is so little understood by the average Congressman, or the political heads of the Cabinet, that no reform can be secured. The law requires each shipper to make a special clearance at the Custom House of the goods he ships by any vessel, but imposes no penalty for his neglect. The master of the vessel must then put all these goods on his manifest when he clears his vessel. A failure to do this subjects him to a fine. It often happens that a shipper neglects to clear his goods, it being some trouble to visit the Custom House in person. The only way the master has of enforcing this duty is to refuse to sign the bills of lading until the shipper has made his clearance. If the master puts the goods on the manifest and they have not been cleared, the vessel may be detained. We suggested that each shipper should be required, under a penalty, to file with the vessel or its agents an invoice of his goods, sworn to before a notary, and then let the master submit all these with his manifest. This would avoid the trouble

of going to the Custom House in person, and answer all the purposes equally well. If a shipper refused to clear his goods a mandamus might compel him, and a penalty should visit the offender. Another and more difficult problem is to provide for filling out the manifests of steamers and vessels requiring great dispatch. The master wishes to clear his vessel on the day before he sails, and will put on his manifest all goods thus far received and cleared, and swearing that this is his cargo, obtain the official clearance. He will then go on receiving goods up to the hour of sailing. Generally the customs authorities wink at this, and allow the goods to be added as a supplement after the oath. Where this is not done, the goods are omitted altogether from the manifest, and escape the export returns. The whole system ought to be remodeled. There is no object in making the owner of every package go through the form of a visit to the Custom House and a separate clearance, and there ought to be some way of facilitating the loading and clearance of a steamer without omitting half her cargo from the manifest.

9. Is a merchant liable to pay duties on sugars in bonded warehouse if the same are destroyed by fire before withdrawal?

If duties on sugars in bonded warehouses have been paid, and such sugars are destroyed before or while in course of delivery, does the government refund the duties on the goods so destroyed?

A. The law permits the Secretary of the Treasury to rebate or refund the duties due or paid on goods damaged or destroyed while they are in the custody of the government; and since the passage of the act no secretary has refused to make such a settlement.

10. If a United States bonded warehouse is totally destroyed by fire, and all the goods lost, does the Custom House collect duties upon them? Or, in other words, must an importer have sufficient insurance upon bonded goods to cover invoice value and duties?

A. The Secretary of the Treasury is allowed by law to cancel, abate, or refund duties on goods lost or damaged by fire or other casualty while in the custody of the government, and he has never refused to do it since the act was passed.

11. To decide a dispute will you please say whether under the

laws of the United States, personal luggage brought into the United States, used or not used, but not for sale, is dutiable or not?

A. The law exempts from duty "wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation or employment, of persons arriving in the United States." Rev. Stat., sec. 2,505.

The law undoubtedly intended to allow all clothing designed for the person's own use, and all other articles properly classed under the personal baggage or effects of a person traveling, to come in free; but the attempt to defraud the revenue by filling many trunks with gloves, silks, etc., purchased on the order of others, has led the Revenue Department to go to a great extreme in the opposite direction, and in carrying out the law great injustice has been done, and much ill-feeling excited by a most unwarranted exclusion of articles of personal property that should have come within the exemption.

12. In the month of June (?) 1874, the duty on certain goods, which till then had been 35 per cent. ad valorem, was raised by a decision of the Secretary of the Treasury, to 50 cents per pound, and 35 per cent. ad valorem. This rate we paid accordingly. The above decision was recently reversed, however, and we have been informed on authority that the additional 50 cents per pound will be refunded, but of course only to those who paid duty under protest. Has the Custom House a right to ask or levy a duty to which it is not entitled, and can it retain the same if obtained under such circumstances?

A. There is no way of obtaining a return of the duty except by act of Congress. If the victim pays the exaction without due protest, he is robbed and has no legal remedy.

POST OFFICE.

13. Can the writer of a letter get it back from the post office after it has once been mailed?

A. Sec. 171, P. O. Ins., allows the return of a letter still at the mailing office, at the request of the writer, his identity to be established by his executing a fac simile of the address. Section 172 provides that the delivery of a letter cannot be prevented or delayed by the alleged writer after it leaves the office of mailing. The courts, however, would intervene and stop the delivery

of a letter on application of the writer, proper cause being shown.

14. If I purchase a post office order in New York for \$100, payable in Boston, and from any cause the order is lost or destroyed, and is not paid in Boston, will the post office department pay my money back?

A. Section 115 of the Post Office Law provides that whenever a money order has been lost, the Postmaster-General, upon the application of the remitter, may order a duplicate thereof to be issued without charge, providing the party losing the original shall furnish a certificate from the postmaster by whom it was payable that it had not been and would not thereafter be paid, and by the postmaster issuing it that it had not been and would not thereafter be repaid.

DEBTS.

1. I loaned some money to a stock broker, taking as collateral an assignment of said broker's seat in the Stock Board. I have tried for the past year to collect this debt, but have been put off with excuses that I consider frivolous. Will you please inform me whether I can sell the seat in the Board, and if so how to proceed? Some of my friends tell me a seat in the Board is similar to a membership in a club, and not salable.

A. We are informed by the secretary of the New York Stock Exchange that creditors cannot sell the seat of a debtor. When a seat is sold the buyer must have his application passed upon by the committee on admissions, and no member of the Exchange would buy a seat under such circumstances.

2. A indorses a note for B, and B's wife furnishes security for nearly the amount of the note by transferring and recording in proper form some stock.

Should B fail in business and pay 25 cents on a dollar, could A present for his claim the whole amount of the note, or only the balance that he is not secured on?

If A cannot receive a dividend on the whole amount of the note, how could it be arranged so he could, B being willing?

A. A can only prove for the balance of his debt deducting the value of his security if he chooses to retain the latter. He must surrender the collaterals to the estate in order to prove for his whole debt. Every such creditor has the option of three

selections : He may rely wholly on his security ; or he may abandon his security and rely wholly on the estate ; or he may release his security as far as it will go, and, proving his debt, receive a dividend on the balance.

3. We were part owners in a coasting schooner for several years. At a certain date we sold our interest to the captain with the knowledge and consent of the managing owner. At this time the vessel was in debt, though no demand had ever been made upon us for the payment of our portion. The captain assumed our portion of the indebtedness, for which an allowance was made by us in the amount of purchase. The vessel was run by the new owners for nearly a year, freighted quite a large amount, and expended considerable money upon herself, when she was lost, the captain and crew with her. The captain's entire estate was invested in the vessel, and uninsured. After a lapse of four months from the date of loss of the vessel, two firms who were part owners in the same, and who held bills against her, made a claim upon us for our portion of the indebtedness at the date on which we sold out, claiming that while new bills contracted had been paid, the old bills remained unpaid. Are we liable ? If so, to what amount, and what interest have we in freights and insurance collected and moneys expended on the vessel by the new owners from the date we sold out until she sunk, while the old indebtedness remained ?

A. Our correspondents were not released from liability to creditors by the captain's assumption of it on purchasing their share of the vessel, unless the assent of the creditors was given to such release ; neither did they, unless by specific agreement to that effect, retain any interest in the vessel's earnings, insurance, etc., in order to offset against the old debts. Provided these were such as to have been binding on the shareowners when contracted, their only avenue of escape from liability seems therefore to be by way of the statute of limitations, in the case that six years elapse from the time the debts became due and the date of suit brought, or promise made to pay. There is a possibility, however, that the debts were actually paid, and that the appropriation of payments to later debts, leaving the older ones a charge against our correspondents, was a device resorted to after the loss of the vessel. If that should turn out to be the fact, and it can be proved by the books of account, of course our correspondents will be discharged from liability.

4. Suppose A loses \$400 playing cards with B, is A compelled by law to pay B, both being of age, or is it only a debt of honor?

A. A cannot be compelled to pay B any sum of money on such a consideration, and if B has paid and repents, he can sue for and recover it.

5. Can a proof of debt against a party in another state be sworn to before a notary public here, or must it be acknowledged before a commissioner of that state?

What fee is a commissioner of another state, resident here, entitled to for administering oath in such a case?

A. In some states, perhaps most, the certificate of a notary would be sufficient; but there are a few states in which only a statement verified before a commissioner is accepted.

For affidavits to be used in the Eastern States only 50 cents is allowed by the statutes under which they are recognized. Most Western and Southern States Commissioners charge one dollar.

6. A & B while in business as partners sold goods to C. A & B subsequently dissolved partnership, each going into business individually. A buys goods from C; C subsequently dies insolvent, owing money to the firm of A & B, A at the same time owing money to C for goods bought after dissolution of firm of A & B. Can A put the amount owing to C against the amount owing by C to the account of A & B?

A. Joint debts are no set-off against separate debts, and separate debts are not a set-off against joint debts.

7. A owes B \$10, on payment of which he tenders a \$20 bill. B refuses to accept the \$20 bill on the ground that A is obliged to pay the exact amount of the debt and has no right to expect him to change the bill. Now is B correct, or does he not lose his claim to the debt by refusing to accept legal money when offered in payment thereof?

A. B is right. It is not a legal tender to demand either change or a receipt. Moreover, if A tendered the exact amount and B declined at the time to take it, he would not "lose his claim." He could recover it by suit, but could get no costs or interest with it.

8. A loans to B a sum of money, receiving as collateral security a warehouse receipt for goods stored by B in a public storehouse, the storehouse receipts are made deliverable to bearer. B fails and is thrown into bankruptcy; in this case does the collateral hold good, or are the goods considered as a part of his general assets?

A. If B had a right to pledge the property A can retain his lien, and if the goods are of sufficient value, can secure his claim.

9. We sold to a certain party, out of town, several bills of merchandise, amounting to about \$2,000. The terms agreed upon were 60 days. When the account became due we requested a full settlement. In answer to this request he sent us cash \$500 and for the balance a six months' note dated from the average date of purchase. To induce us to accept this settlement he wrote as follows (his own handwriting). "I hope this will be satisfactory to you. I doubt that you can sell my note at present, but you need not sacrifice the paper, as you may depend on it will be paid at maturity." To oblige him, having this guaranty we accepted the note. Before the note became due, the party failed and the note was protested. We have found out that at the time he made this statement he was already insolvent, having given a confessed judgment, but which was not enforced nor recorded. Under these circumstances have we a right (without making us liable) to have the party arrested for false pretenses, in knowingly defrauding us, as we could have forced payment at the time.

A. The debtor's mere assurance, under the circumstances, that the note would be paid at maturity, coupled as it was with a hint that might have put the creditor on his guard, cannot be treated as a fraud punishable by criminal process.

10. We have a claim against an estate in Fla., made before the decease of the party. We have proved it, adding interest after maturity, and have sent it to the administrator. The attorney for the estate has written us: "The law of Fla. says nothing as to interest on open accounts," and that they "will be prepared to settle the estate before two years as allowed by statute," and therefore they "cannot allow interest." Please advise whether or not we can compel the payment of interest.

A. It appears to be true that neither the statutes of Florida nor its Supreme Court decisions furnish a positive rule on this question, and it would therefore be unsafe to make a confident statement in response to our correspondent's inquiry. But if the claim consists of a liquidated demand, or account stated or acknowledged, the weight of authority is in favor of the allowance of interest. In *Milton v. Blackshear*, 8 Fla., 161, the Florida Supreme Court laid down the following rule: "We are inclined to hold that in all cases where the demand sued is a debt *eo nomine*, in contradistinction to unliquidated damages, interest is allowable thereon from the time when the same

becomes legally due and payable; and when no such time is ascertainable, then interest is allowable only from the date of an actual demand for payment, or of the commencement of the suit."

DEEDS.

1. If a wife sells her real estate is it absolutely necessary for her husband to join in the deed of conveyance? If it is necessary, and the husband is not made a party to the deed, could he claim any use of the property after the decease of his wife, or what would be the result?

A. Married women in this State (N. Y.) having been given, by the law of 1860 as amended in 1862, the right to convey or contract with reference to real estate, constituting then separate property, the same as if they were unmarried, we see no reason why the husband should now join a deed of conveyance of such estate. The husband's tenancy by the curtesy can only exist in real estate of which his wife died seized, and not even then if she has devised it away.

2. My grandfather gives me a deed to property and in the place for mortgages or incumbrances is the following clause. "Subject however to the rights of I. I. C., to occupy the said premises free of rent so long as he may live or desire to occupy the said premises." Does this clause debar me from giving a clear title? Will it be necessary for me to get a release from I. I. C. and put it upon record before I can give a good title to or possession of the property to a third party?

A. The property cannot be conveyed free of the charge without a recorded lease from I. I. C., but the owner of the fee can sell out his own title as it stands.

3. An old lady wishes to leave her house and lot to her son, but she is advised to retain her right and title to the place while she lives. Now, which is the better way, shall she devise the property to him by will, or shall she deed it, the deed to remain in escrow until she dies?

A. We see no objections to conveying the property by deed to be held as an escrow until the grantor's death. A precedent for such a transaction may be found in the case of *Ruggles v. Lawson*, 13 John., 285. The advantage is that the expenses of proving the will is saved. But if the mother would learn the importance of observing the legal conditions to make a good

escrow, let her first read King Lear, and then take note that the deed must be held in the custody of a stranger, and not of the grantee, otherwise the property will pass to the son at once.

4. A resident of this State (N. Y.) makes a will in conformity to the laws of the State, and also owns property in Indiana. Will it be a valid will in Indiana so as to dispose of the real estate? Also, how should a deed be made here by a resident of this State (N. Y.) to transfer real estate in Indiana?

A. The general rule is, that wills intended to operate on real estate must be executed in accordance with the laws of the State or country where the realty is situated, but the rule has been altered by statute in Indiana and other States, and a will duly executed in New York according to the laws of New York will pass title in Indiana.

As to deeds, the Indiana law makes no special requirement, and such an instrument drawn after New York precedents would be good. If acknowledged before an Indiana commissioner of deeds, it would save some trouble when presenting it for record.

5. If we sell a piece of property and accept the purchaser's note for the same, give purchaser deed, and the note is not paid, have we any lien on the property, or could we by any process of law have the deed set aside and take possession? Again, if we sell for a stated amount, give deed without consideration, accepting the purchaser's credit to pay us, and he fails to make any payments as per agreement, have we any recourse other than civil suit for the amount, having satisfied ourselves that there had been no fraudulent representations?

A. The sellers have no lien on the land. They might, after trying in vain to collect the consideration promised, move to have the conveyance set aside for want of consideration; but it is not certain that the courts would grant it even then, if the title still remained in the grantee, and they certainly would not if the land had been conveyed to an innocent third party. The straight course is to exhaust every remedy to collect the consideration by legal process, and if that fails to move that the deed be set aside for failure of consideration. This might be granted if no innocent third party would suffer.

6. A sells B a house and farm and B gives A a mortgage on it for part of the purchase money. After some time elapses B finds he is unable to pay A, and deeds the property back to A, to take effect

April 1st, 1878. Before that time the house takes fire and burns up. B has insurance on it for \$4,000, and had not transferred it to A? Cannot B claim the amount of insurance from the insurance company just the same as though no deed had been given to take effect on April 1st, 1878?

A. If the deed did not take effect so as to transfer the title until the first of April, it could not affect B's right to recover for a loss which took place before that date.

7. A sells a piece of real estate to B for \$1000 cash and \$1000 purchase money mortgage. In one week A's mortgage not being recorded, B mortgages the property to C, who immediately records his mortgage. Does the purchase money mortgage take preference and C lose his first lien on the property?

A. If the deed from A to B stated the fact that part of the consideration was a mortgage for \$1000, that would be a sufficient notice to C, so that the mortgage to the latter would not be a first lien. If there was no such statement and C had no notice, his mortgage in this State (N. Y.) would stand fast, being first recorded. It is the rule in nearly all the States that where the purchase money remains unpaid, the seller has a lien upon the land against subsequent purchasers who have notice of that fact. And upon the question what shall be a sufficient notice to charge a second purchaser or mortgagee, it has been held that the latter is bound to take notice of all liens shown to exist by his vendor's title deed.

8. A citizen of New York dying in 1871, intestate, leaves real estate in this State (N. Y.) In 1879 his children (the widow releasing her right of dower) give a deed for it. Is it necessary for the husband of the married daughter to sign with her, or is her independent signature sufficient?

A. In this State (N. Y.) the husband's signature is not necessary.

9. Is there any obstacle to the recording of a deed after the death of the person making and giving the same (real estate being meant), in a case where there has been neglect to record same prior to the death of the maker?

A. If the deed had been delivered and title passed before the grantor's death, that event will not affect the right to have it recorded.

10. Have the courts ever decided that it is not necessary for a deed of real estate to be recorded to make it legal? What relief would a party have who purchased a piece of property from A in good faith, and finds that B has a deed dated prior, although B never placed his deed on record? Say that A has an account with B and has given the deed as collateral, would that make any difference as to the ownership of the property and the recording of the deed? Would it be necessary for B to protect himself to have either the deed recorded, or a paper filed in the Register's office showing the facts?

A. If C buys a piece of land from A in good faith, the title on the record standing in A's name, and puts his deed on record, he can hold the property, although A may have previously sold it to B, the deed to the latter not being recorded. If neither deed is recorded, and B finds that A has sold the land again to B, he will put his own on record about as quickly as possible, and thus protect himself. It is not necessary to record the deed to hold the property against the grantor, but it is necessary to prevent a sale to other grantees, who by recording their deed may obtain a title in preference.

DIVORCE.

1. When a woman gets a divorce either absolute or limited (supposing her husband to be a man of means), does she lose her right of dower, or is there a division of property at the time of receiving the divorce, or does the court allowance of alimony release the husband's property entirely? Or reverse the case, the husband receiving the divorce, and the wife having property in her own right: Does he receive any from her estate?

A. The right of dower in an estate is barred by more than half a dozen different subjects (such as a joint conveyance of the estate, etc.) and one of these is "by a divorce *a vinculo matrimonii*." And this would cut off such a claim to interest in the estate of a deceased person on either side.

2. Jane Doe obtained in this State (N. Y.) a divorce from John Doe, both then being residents of this State (N. Y.), with permission to Jane to remarry, but forbidding John's so doing during Jane's lifetime. Can John legally marry in any other State? and which? Could he be criminally prosecuted in any other State for so doing? and which? If he came here after marrying, with or without his new wife, could he be criminally prosecuted?

A. In this State (N. Y.) it has been held by our Supreme

Court, and a *dictum* of Judge Johnson in the Court of Appeals is to the same effect, that the guilty party to a divorce cannot remarry, in this State (N. Y.), even though he or she was a resident, and divorced under the laws of another State. (Smith v. Woodworth, 44 Barb., 198; Cropsy v. Ogden, 1 Kernan, 228.) Bishop, however, in his treatise on Marriage and Divorce, observes that this rule is contrary to the doctrine laid down in Tennessee, and contrary, he thinks, to sound canons of interpretation. In Kentucky, the remarriage of the guilty party constitutes the crime of polygamy, but a person divorced in Kentucky was married again in Tennessee, and the courts of the latter State held that no crime had been committed, and the marriage was valid. In Mississippi the guilty party is not forbidden to remarry, and John Doe may therefore go thither and take another wife; indeed, so far as appears from Bishop's researches, there is no State except New York where the contrary has been determined, though this is not saying it might not be if the case arose. Two questions are involved here. The first is, is the marriage under such circumstances valid? An affirmative answer was given by Surrogate Tucker, in the matter of the Webb estate, which was the case of a second wife seeking dower in the lands of her husband, who had been divorced here, removed to New Jersey, married and resided there, but afterward returned to New York. (1 Tuck., 372.) The second question is, may not the party be punishable for contempt? We do not know of any case in which this question has been decided, but on general principles we should answer that he might be. In a former reply to a similar question we stated that such parties who remained and lived quietly in this State (N. Y.) were not disturbed; but they could be punished for contempt, and would be, if they gave sufficient provocation in a disorderly life. If the decree forbids remarriage, it seems to be a matter of no consequence that the contract itself may be valid, in spite of the prohibition, or that the act prohibited was not done within the jurisdiction of the court. Thus, the Supreme Court in Fenner et al. v. Sanborn, 37 Barb., 610, affirmed an order of a county judge imposing a fine of \$500 on the defendant, for confessing judgment in a foreign State, contrary to the order of the court.

We do not suppose it worth a serious inquiry whether parties divorced here can be punished criminally in another State for remarrying there, though it is, of course, possible that laws of such extraordinary rigor exist, unnoticed by any of the writers on the subject.

3. Can a British subject resident here for years, having a wife in England, undergoing a sentence of five years' penal servitude, marry in this country? What course must he take? Will it be necessary to become an American citizen, in which case he is entitled to an absolute divorce?

A. The laws of this state (N. Y.) do not permit a divorce for the cause stated.

4. The laws of South Carolina respecting divorces are not recognized etc. A person marrying in the State, holding property, real and personal, but subsequently obtaining a divorce in another State and marrying and resettling in South Carolina; now what power can the laws of South Carolina, in the hands of the heirs of the first marriage, bring to bear on the property of the person mentioned? If there are no children by the first marriage, can the other heirs by marriage claim and possess the property in case of the death of the husband? and can the children of the second marriage and their claims to the property be set aside on the grounds of illegitimacy, over the force that the will of the father might dictate? If there is any possibility of the claim to the property being disputed, were it not safer to transfer it to another State holding different laws?

A. A South Carolina judge adverting to the point raised in the above communication remarked: "Few subjects are more difficult, few questions more perplexing than the effect of a foreign divorce." (Hull v. Hull, 2 Stroh. Eq. Rep., 167.) By a foreign divorce, of course, is meant a divorce obtained in another State of the Union as well as in a foreign country. The judge goes on to say that "in reference to a South Carolina marriage it has been often repeated, though never finally decided, that the doctrine in Lolly's case is the law of this court." The doctrine of that case was that no foreign divorce could dissolve a marriage in the place where it was contracted; and considering the dispute into which the divorce laws of many of the States have fallen, we doubt if the South Carolina courts would now be disposed to depart from the direction thus given to the jurisprudence of that State on the subject. We presume, accordingly,

that the divorce would be held void in South Carolina, and the children of the second marriage illegitimate. In such case, the proper heirs in South Carolina would take all the property not disposed of by will, to the exclusion of these children; and not more than one-fourth part of the clear net value of the estate could be disposed of in favor of the second wife or children. Under these circumstances, the transfer of the property to another State, where the divorce would be held valid, is the only available expedient; but the first wife's right of dower could not be got rid of in that way.

DRAFTS.

(SEE ALSO BILLS OF EXCHANGE.)

ACCEPTANCE.

1. I have been accustomed to receive from correspondents drafts for collection at 30 days, accompanied by bills of lading with instructions to deliver property on payment of draft. These instructions I follow literally until they are amended, which is usually the case, as a merchant would hardly feel disposed to accept without getting the property in hand or to pay the whole amount of the draft before maturity, which I would be obliged to exact, as I have no instructions to allow discount. Recently I have received from a new correspondent a draft at 30 days accompanied by bill of lading, without any instructions whatever. How should I act in such a case—deliver up the property and take the acceptance and run the risk of a failure of payment, or demand the cash, or protest for non-acceptance and return the draft?

A. The courts have decided that in the absence of instructions, or a well established custom equivalent to instructions between the parties, the collector should surrender the bill of lading on the acceptance of the draft, and is not then responsible for the payment of the latter.

2. A firm sells a bill of goods to A on 90 days time, for which purchase A gives his draft on B, who is a partner in the firm of B & Co. of Philadelphia. The draft is sent forward for acceptance; when presented C accepts the draft in the name of his firm. Is there a necessity in order to prevent any possibility of trouble that the address of the draft or its acceptance should be altered?

A. The address cannot be altered now. The acceptance of B & Co. if bona fide is a good acceptance, as it binds them to pay the draft for the honor and credit of B. The proper way to

prevent any question in regard to it, if there is any as regards the right of B to accept in the name of his firm and thus to bind them to its payment, is for him to accept in his own name above the name of the firm. But that is not necessary.

3. A draws a draft at 30 days for \$1,000 on B, who refuses acceptance, and the bill goes to protest for non-acceptance. The notary marks the costs of the protest on the face of the draft, under the figures representing the amount of the draft, which are in a corner of the draft. Subsequently B accepts the draft, making it payable at bank. In this acceptance does he or does he not accept the amount the draft calls for and the costs likewise?

A. The drawee should have paid the costs of the protest if that had been the intention of the holder. The acceptance and order to pay only carry with it the amount stated in the body of the draft.

4. If a note is made payable to a bank and not paid at maturity, and a portion, or say one-half the amount, paid subsequently and not indorsed on note, but placed on books to credit of maker of note as part payment, does the whole of the note draw interest till all is paid?

A. A part payment, however acknowledged, if more than the interest due at the date, is to be computed in the adjustment of the final payment.

5. A correspondent sends us for collection a draft at 30 days, drawn on a banker here, against a letter of credit issued by a European bank; draft being drawn for full amount of credit. The banker claims that the letter of credit must be left with draft, or he will refuse acceptance of same, and after draft has been accepted, claims that the letter of credit belongs to him. Is it proper to surrender it before the money is *actually paid*? And, should the acceptors fail before the draft becomes due, would the claim hold good against the bank issuing the credit, the same as if it had not been surrendered?

A. The letter of credit is exhausted when the draft is accepted, as it was given simply to obtain such acceptance, and is no longer of any value to the person for whose benefit it was issued.

6. A doing business in another city, draws on B and C for four months. The draft is presented and accepted. A gets the acceptance discounted at his bank at home. The bank understands that it is accepted by B and C as a matter of accommodation. When the acceptance is about due A tells his bank they need not forward it for collec-

tion, that he will take care of it. Time passes and A does not pay it. Can the bank hold B and C?

A. If payment is demanded within a reasonable time B & C can be held. An acceptor is not discharged as an indorser is, if the draft is not presented on the day when it is due.

7. A, a manufacturer, makes a draft payable 10 days after sight upon B, a commission merchant, notifying B that he has sent goods to cover the draft. B accepts the draft, the goods arrive and are unsalable by fault in manufacture; B notifies A and refuses payment of the draft. Supposing the draft to be discounted, is B responsible because of his acceptance?

A. If the draft remained in the hands of A until after maturity, B could successfully resist payment; but he is obliged to pay it to a bona fide holder for value, the equities between him and A not entering the question between him and a third party who discounted it before maturity.

8. A commercial house in the United States opens a credit for a foreign firm, which firm draws on the parties here and the draft is accepted. When the draft becomes due the foreign party or firm has not made good the amount to the parties here who accepted the draft. Can the parties here be made to pay the draft under such circumstances?

A. The law is very plain that a man who accepts a draft is bound to pay the same to a bona fide holder for value, no matter what may be the relation between him and the drawer. In this case the commercial house must keep its promise and pay the draft, although they may never recover the money.

9. It has been our custom, since seeing the decision in the Louisville-Boston case, to hold bills of lading attached to drafts sent us for collection, whether drawn at sight or on time, until drafts are paid.

A. The United States Supreme Court, in the case of the National Bank of Commerce of Boston v. Merchants' National Bank of Memphis, decided October term, 1875, gave elaborate consideration to the subject, the fundamental question in the case being, as stated by Judge Strong in the opinion, "whether a bill of lading of merchandise deliverable to order, when attached to a time draft and forwarded to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to

hold the bill of lading after the acceptance, for the payment." The Court held that it was the right of the drawee in such case to require the surrender to him of the bills at the time of acceptance, and said: "We feel justified in saying that in our opinion no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft." Of course, if there is an instruction by the drawer not to deliver, that must govern.

10. "A" is a perfectly responsible party. B a merchant, who sells A goods to the amount of \$500 on 30 days' time. Before the expiration of the time, however, B *draws* upon A, making the draft due at the end of the 30 days, and gets C to discount the paper. On the first presentation A "accepts" by writing his name across the face of the draft; but, when the draft becomes due, A fails to pay, and B is compelled to pay C the amount of draft. Can A be sued on the acceptance?

A. We do not know that this question has ever been decided by the courts, but the sentiment of the legal profession appears to be against the right of the drawer to bring a direct action on the acceptance. In an Illinois case, the drawer assumed that he could not, and brought suit for his own benefit in the name of the payee. The United States Circuit Court sustained this mode of procedure, and we see no reason to doubt that the courts would follow the precedent. It concedes the drawer's substantial right of action on the acceptance.

11. Must an out-of-town draft on a person here, reading "Ten days after date please pay," etc., be presented for acceptance when received to hold the maker; also, whether same can be protested for non-acceptance.

A. It is entirely optional with the holder whether a draft at so many days after date is presented for acceptance. It is prudent to do it, and if acceptance is declined it must be protested to hold the indorsers.

12. A draft at five days' sight drawn in the State of Florida on our house here, must the same be accepted at once on presentation, or have we any time by law or custom to accept the same, later, provided we are willing to accept same from date of presentation?

A. In this State both by law and custom the drawees may demand 24 hours' consideration from the time the draft is presented for acceptance.

13. The drawee of a sight draft entitled to a reasonable time—say 24 hours—to examine into the correctness of the draft, either as to the calculation in the invoices, or to give time for the bill of lading to arrive if not attached to the draft.

A year ago a bank presented a sight draft to me about noon, without bill of lading attached. I immediately telegraphed to the drawer for the reason, but could not expect an answer before the time banks usually turn over unpaid drafts to their notary. I explained to the cashier that I was sure the bill of lading would be in the next mail, but as my company required me to have bills of lading or know why they were not attached, I requested him to hold the draft till next day if an answer did not come before close of bank. He replied that if the draft had not been officially presented by the bank, he would hold it till next day for presentation, but anyhow would get the opinion of the bank's attorney. At 3 I returned to the bank and learned that the attorney decided the draft would have to be paid under the circumstance or go to protest; so I paid it.

As I could reasonably expect an answer to my telegram before close of mail that day, I, a duly qualified notary, offered to hold the draft, and if I, as secretary, did not pay it before close of mail, would protest the draft and conform of course to all laws and customs regarding the mailing of notices of protest. The cashier said he did not think I could do such a convenient thing.

A. Where a draft is payable on demand, or not needing acceptance, is held until it is due and payable, the drawee is not entitled to any delay, but "in every case of presentment for acceptance, the drawee is entitled, if he requires it, to have twenty-four hours to consider whether he will accept the bill or not; and it is usual, in such cases, for the holder to leave the bill with him during that period."—Story on Bills, 237; Chitty on Bills, ch. 7, p. 306, 307, 311, and a great host of other authorities. This has never been disputed. It is provided in this State by law that where the drawee does not return the bill within the 24 hours, he shall be held to have accepted it and be liable to pay it when due. The only dispute has been whether the holder was obliged to leave the bill with the drawee while he took this time for consideration, and it has been settled, both here and in England, that where the drawee is not well known or for any reason the

holder desires not to incur the risk, it is sufficient that he leave a copy of the bill with him.

If the bank left a draft which was due and payable with the drawee on his agreement to protest it, if he did not receive advices by mail authorizing the payment, it would do so at his own risk, and we think that such a concession could not be required of it. If the presentation was merely for acceptance, however, it might safely have done this, and it was bound to give the drawee twenty-four hours' consideration if he asked for it. This time for consideration it will be seen is only given where it does not postpone the day of payment.

14. A draft is presented for acceptance at my office (which by law is closed at 2 o'clock P. M.) after the hour of closing, and is protested for non-acceptance. Am I bound for the fees?

A. If a draft is made on a person in his individual capacity, the holder has the right to have access to him at any time during business hours, and the fact that he has a professional engagement at an office that is closed by law or custom at an earlier hour, will not excuse his denial if he cannot be found within such reasonable hours as the collector had the right to select. But, on the other hand, the holder or collector has no right to present the draft at the office, after what he knows to be its closing hour and then to protest, without making any further effort to find the drawee. For instance: If a draft is made upon John Jones as a private citizen, and Jones is President of a bank that closes its doors at three o'clock, the holder may not seek Jones at the bank at four o'clock, and because the bank is closed, protest the draft without trying to find him at his residence.

DRAWEE.

15. On the first of August my house received from Smith a draft which reads as follows:

\$177.11

BLACKSHEAR, GA., July 29, 1878.

On the 4th day of August next pay to the order of C & Co., to pay note April 8, 1878, made payable to them at 90 days), \$177.11-100, value received, and charge the same to the account of —

To A & M, Savannah, Ga.

As appears from the face of the paper it was sent to pay a note which C & Co. held against S. for \$177.11, but the note was due August 4

at their office, Macon, Ga. (not 90 days from April 8). On receipt of draft the note was canceled and forwarded by mail to Smith and the draft placed in bank for collection. On presentation of the draft payment was refused and the following reason given to the notary : "We are in funds, but as this draft is drawn to pay note and so specified in draft, we must decline payment unless note accompanies it."

Query—Was it proper to refuse payment on the grounds given? Was it at all incumbent on A & M to see to the application of the money they were ordered to pay?

A. The drawee of a draft is subject to the private instructions of the drawer, and is under no other legal obligations to the payee. If A & M had received instructions not to pay the draft unless the note accompanied it, they did right to refuse. But on the face of the draft there was no call upon them to demand the note or to ask for a certification of its payment; and if they had no other authority, such a refusal was an error of judgment. C & Co. have no ground of action against A & M, but they can protest the draft and collect it with fees and costs from the drawer.

16. A party presents us a time draft for reception, dated in this city, and which has printed on its face, "with current rate of exchange." Taking it for granted there would be no exchange, as the draft was dated here and payable here, we accept it without erasing the words "with current rate of exchange." The draft is paid over to a house in a distant city, and in due time is forwarded here for collection. Can the collecting bank require us to pay exchange?

A. The bank cannot collect "the current rate of exchange" between the place of payment and a distant point simply because the holder at the time of maturity happens to live at that point. If this could be done, a time draft dated in New York might be sent to China, and being collected from thence add a very large sum to its face.

17. A Canadian firm notifies us of shipment, and draft for same on six days' sight, but their bankers make the draft at sight, accompanying it with bill of lading. Our office was closed on a semi-legal holiday, and the bank here holding the draft claims to have so found the office and protested the draft and returned the bill of lading and draft to Canada. Should not the Canadian firm pay the expenses of protest? Was the course of the New York bank correct in returning the bill of lading and draft without presentation?

A. The Canadian firm is not liable for the expenses of protest on account of their error in describing the draft, as it is not certain that the same thing might not have happened if the error had not been committed. This habit of introducing extra semi-legal holidays by vote of the several exchanges we have never favored, as it leads to great confusion and annoyance. We think the fact of the holiday might have been recognized by the bank, and the draft held over until Monday; but bank officials are themselves often in doubt as to the course they ought to pursue. The produce exchange and all the other official boards of trade adjourned over, so that the bank would have been fully justified in holding the draft until Monday.

18. We buy a bill of goods of A, which on account of error in shipping have not been received. Some weeks after shipping goods A makes a sight draft on us for amount of bill, which we do not pay, and the same is returned and protested. If we afterward find the bill correct and pay A, can the holder of the draft also collect it of us? or is a draft on us without notice equivalent to an assignment of the claim?

A. If the sight draft has not been accepted or authorized by him, it is in no way binding on our correspondents, and if they pay their debt, the holder of it has no claim on them.

19. Can a drawee claim 24 hours in which to pay a demand draft? If so, in what form can it be put in which payment on day of presentation can be claimed?

A. In all cases where a draft is presented for acceptance the drawee is entitled to 24 hours' consideration. If a sight draft is thus presented, where grace is allowed, the drawee could claim his 24 hours but this would not delay the payment, as when accepted it must bear the date on which it was first seen by him. If payable on demand without grace the drawee cannot claim the 24 hours' indulgence, and must pay it on the day the demand is made, or suffer it to be protested.

20. A of Chicago sells \$5,000 worth of goods to B of the same place, deliverable thirty days after date of sale, and calculates his profit at \$500; he (A) immediately orders the goods from C in New York, and in payment thereof draws, with advice, on D, who holds his funds. D refuses to accept, and consequently the goods are not shipped. Can A hold D for damages and can B hold A for the same?

A. The seller A is liable to B for all reasonable damages for non-delivery of the goods as per agreement. How far D is liable to A for refusing to accept his draft depends upon the relations between them and the nature of their contract. If D had agreed to accept A's draft to a given amount, or for funds in hand, he is liable in damages for a breach of that contract. A simple depositary of funds is not bound under a penalty to "accept" or even to pay a draft against such deposit.

21. The drawer of a draft is the agent of the drawees, having been sent out by them to purchase merchandise for their account and draws on them to obtain funds in order to pay for said merchandise.

This draft was sold by their agent on 30 and 60 days' time, and on presentation of the same by us at the office of the drawees they decline to accept it, simply because it had been sold on credit and they did not know the purchasers. (Of course they could not know the purchasers in a foreign country, and ignored the judgment of their agent.) The purchasers and ourselves are branch houses, consequently we suffer, as the exchange had been sent to us to pay liabilities and must suffer for goods for nearly sixty days before we can receive funds to cover this draft.

Are not the drawees responsible for the acts of their agent, provided he acted, and the draft was bought, in good faith? We will state that it is customary, where this draft was bought, to buy and sell exchange on credit. Suppose there is no law where this transaction occurred allowing certain damages, or that nothing beyond the amount, with interest paid on account of the draft, can be recovered from the agent by our branch house, can the drawees in this city be made liable for damages? If so, can they be made liable beyond the 10 per cent. allowed by our law?

A. Unless the drawee has given authority to draw with a guaranty of acceptance and the bill has been negotiated on the strength of such guaranty, the holders of the draft in question have no recourse except to the drawer. And the law of the place where the bill was drawn will govern as to damages. Where there is no law or fixed custom, all the costs of protest, of re-exchange, and other reasonable damages can be collected; but in all civilized countries there is now some law or established usage that governs the question of damages upon returned bills.

INDORSEMENT.

22. If a banker pays a draft on which there is an irregular indorsement, or indorsement lacking, is the party collecting the draft liable for return of the funds in case fraud transpires?

A. All indorsers of a draft guaranty the genuineness and regularity of the preceding indorsements, and a man who collects a draft on a forged or irregular indorsement is liable to a claim for the return of the money.

23. Bills at 60 days' sight, drawn in Havana on firms in this country, are usually drawn in favor of a minor and by him indorsed. They are then sold to banks and other purchasers of paper.

Can the drawers or acceptors of such drafts resist payment on the ground, either that the indorsement of a minor is illegal, or that a minor has no power to transfer property by sale?

A. It has been decided that a bill or note indorsed by a minor is good against all the parties to it so long as the infant is not injured, the protection extending only to the minor himself. Therefore "the bill or note will bind all the parties to it, not only in favor of the minor, but also in respect to each other." Story on Bills, 87.

MISCELLANEOUS.

24. A draft is drawn upon us payable to "John Smith or order." John Smith indorses it "Pay to Richard Roe," omitting the usual words "or order." Richard Roe indorses it blank, and it subsequently passes through other hands, all of whom make blank indorsements, and it finally reaches us for payment in the hands of some reputable party, say one of our city banks. Do we discharge all our liability by paying the draft to the party so presenting, or can John Smith set up the claim that he never authorized payment to any other than Richard Roe?

A. Decisions in England, Missouri, Alabama, Kentucky, and Vermont are cited by Daniel as establishing the proposition that "if the paper be payable to A B or order, and A B indorse it to C D without adding 'or order,' C D may nevertheless transfer it by indorsement, and it retains its original negotiable character." (Daniel on Negotiable Instruments, 1,493.) The New York Court of Appeals has also, reversing a Superior Court decision, decided that a note indorsed "Pay the within to T," is negotiable as though payable to T or his order (*Leavitt v. Putnam*, 3 N. Y., 494). These authorities seem amply sufficient to justify payment of the draft in the case described by our correspondent.

25. Please inform me whether a draft drawn at sight carries with it three days' grace.

A. In this State grace is forbidden by statute on all sight bills.

26. On what day will a draft drawn as follows, and accepted on August 4, be due?

Boston, July 31.

At ten days — pay to order of John Jones One Hundred Dollars, and charge the same to the account of JOHN SMITH.
To H. S. Robinson & Co., New York.

You will notice it does not say after date or sight. In which way should it be construed?

A. The receiver has the right to fill the blank in accordance with the terms on which it was issued. If it comes to a new holder or collector still in blank, he should present it ten days (with grace) from date, and protest it if not then paid.

27. I settled with A five years ago and gave him a draft on B for \$600. B died two years ago insolvent. Can A make me pay the draft, it never having been protested? B was owing me from \$2,000 to \$3,000 all the time.

A. If the above was an ordinary sight draft, the holder, having neither collected nor protested it, cannot come back on the drawer for its payment.

28. I advise my New York banker each day of the sight drafts drawn on him, giving him number and amount. My drafts have the word "original" printed across the face, and they read "duplicate unpaid" pay, etc.; occasionally a customer comes and says a draft of ours has gone astray or he has received no tidings of one sent off some time before, or for some good reason wants a duplicate, which (after examination and finding the original has not been paid up to last advice in New York) I issue same having the word "duplicate" printed across the face, and drawn "original unpaid pay," etc., and advise the New York bank of the fact. What is the duty of the New York bank in the premises?

A. The drawee in the case described should pay the duplicate, and refuse the original if afterward presented.

29. If, upon refusal of payment of the annexed draft by the Tenth National Bank (the bank saying "Have no instructions from payee") can the paper be legally protested in Philadelphia?

The following is the draft

SAN FRANCISCO, Cal., December 10, 1874.

Pay to the order of Snow, Ball & Co., one thousand dollars at the Tenth National Bank, Philadelphia.

Respectfully,

HAIL, STORM & Co.

To Whirl, Wind & Co., New York.

A. The draft is due at the Tenth National Bank, Philadelphia, and should be presented there for payment. Such payment being refused, the draft should be protested in Philadelphia, unless instructions not to protest in case of non-payment have been sent with it.

30. In your Replies and Decisions of 20th inst. H. J. asks two questions, neither of which do you answer. If "the relief which they expect is in the presentation of sight drafts for payment," you give your opinion, but do not say whether it is based on some action or if it is yet to be tried and determined by the courts. The law of Georgia fixes the holidays, and does not give to any sect the right to make others. The custom of this place is for the banks to send out their sight drafts in the morning, and if not paid during "bank hours" to put them in the hands of a notary for protest, and the notices go by the night mail. Such has been the custom for years.

Will you please answer the following questions?

First Under the customs reported above, and as there cannot be two days for protesting sight drafts, would not a bank be legally liable for damages for laches in collecting drafts drawn on a Jew if held over when his place of business was closed on a day not a legal holiday?

Second. Can the observance of a religious holiday by any one make it a legal holiday, so as to protect a bank against a charge of want of diligence, when the law does not provide for its being a legal holiday?

Third. Can you cite a case where it has been determined by the courts?

The question of holding over sight drafts when the drawee is observing a religious holiday has been submitted to several of our leading counsel and without their knowing the opinions of each they were unanimous in saying the banks would make themselves liable.

A. The second question put in the above communication, if answered in the negative, would render it unnecessary to consider the first, since no statute, so far as we know, especially authorizes the forbearance specified. The lack of statutory authorization, however, does not appear to us to determine the point. The general commercial law affords a number of excuses, not recognized by statute, for what would constitute laches in the collection of bills, if the statute law alone were consulted. We recur, therefore, to the first question. The case cited by us in our former article on this subject (*Lindo v. Unswerk*, 2 Camp., 602), was not one of failure to present for acceptance, or to protest for non-acceptance, but of failure to give notice of protest

on a Hebrew holyday ; but its pertinence in defining the principle contended for may be shown by the following citation from Story. He says : "The same general grounds which will ordinarily excuse the holder for the want of due notice of dishonor upon non-acceptance of the bill, will furnish a sufficient excuse for the delay to make a due presentment for payment." (Story on Bills, sec. 327.) The same high authority says, sec. 292 : "If the day on which the notice of the dishonor should ordinarily be given should happen to fall on Sunday, * * * * or any other day which according to the religion of the holder, *or other party*, is required to be devoted to religious purposes (such as Saturday in the case of the Jews) ; in all such cases the party will be entitled to the same indulgence, as to his notice, as if no such day had intervened." The words in italics, taken in connection with the preceding citation, amount to an expression of opinion running on all fours with our own, and if we err it is in excellent company. Judge Story further says : "No acceptance can be required, and no presentment for acceptance can be regularly made, upon a Sunday * * * * or upon any other day which is a holiday, or is set apart by the religion of the drawee for religious purposes." (Sec. 283, citing Chitty on Bills, and Bayley on Bills to the same effect.) Bayley says : "It has been held that where a man is of a religion which gives to any other day of the week the sanctity of Sunday, as in the case of the Jews, he is entitled to the same indulgence as to that day."

These authorities, of course, do not judicially determine the point in question, but they furnish such support to the doctrine of our former reply that we believe them capable of establishing it whenever the case should arise in the courts. Chief Justice Marshall said, in 1828, that the question was one on which, at that time, no decision was found in the books. We know of none since, more nearly in point than that in which this observation was made. (*Bank of Washington v. Triplett*, 1 Peters, 25.) The only difference between that case and the one before us is, that the bill in litigation being payable at a date certain did not absolutely, by the general commercial law, require presentment

for acceptance. But the usage of the bank required such presentment, and the bank having received the bill for collection undertook to procure acceptance. The drawee, however, was not found at his place of business, and a subsequent attempt failed for the same reason. Acceptance was in fact never obtained, nor the holder of the bill notified of the failure, and in accordance with the usage of the banks in the District it was not presented for payment until the day after the third day of grace. But the Court held, Chief Justice Marshall delivering the opinion, that these proceedings did not constitute such negligence as to discharge the drawer.

Our correspondent introduces an element in the case now presented which was left out in the former one, viz.: the usage of the Savannah banks. A settled usage as to the course to be pursued would no doubt determine the liability of the parties. That doctrine was laid down by the Chief Justice in the case just cited, and there are other sufficient authorities to the same effect. But apart from such usage, it seemed to us, and still seems, that the "reasonable time" which all the authorities allow for the presentation of a sight draft was expansive enough to save the rights of all parties if protest should be delayed one day by the intervention of a religious holiday, though not one established by statute law. We did not profess to give a judicial decision of the point, but merely our own opinion; and a review of the authorities does not furnish us with any sufficient reason to withdraw it.

31. Suppose a draft dated in New York drawn on a firm in this State (N. Y.), ten days after sight or after date; said draft is presented for acceptance, which is refused, and it goes to protest for non-acceptance; is it necessary for that draft to be protested for non-payment, if not paid at maturity, to hold drawers and indorsers, or is the dishonor for non-acceptance sufficient?

A. If a bill has been protested for non-acceptance, and its dishonor duly notified, it is not necessary to present it again for payment and protest it separately for non-payment, or to give separate notice of non-payment. Daniel on Neg. Ins., vol 2, page 6; De la Torre v. Barclay, 1 Stark, part 2, 7; Story on Bills, Morrison on Bills, Bayley on Bills, all agree to this.

32. Twenty bales wool sold and shipped to John Smith for which he gives draft \$1000 on S. C. Jones, bill of lading attached to draft, both indorsed to Brown & Co., bankers. Payment of draft is refused, whereupon Brown & Co. have it protested and return to us. Is a protest necessary in this case, the collateral attached, bill of lading being our only security? Should not the bankers at once take possession of the wool and hold for our account, instead of returning bill of lading to us?

A. We think the protest the proper course in the absence of definite instructions to the contrary.

33. Is it necessary to put a two-cent revenue stamp on drafts, foreign or domestic, before accepting such. Who is to bear the expense, the holder or the drawee? Aside from what is customary, what is the law?

A. The law requires a two-cent revenue stamp on all drafts drawn on a bank or banker, and the Revenue Department has decided that this applies to drafts made here on a foreign banker, or made abroad on a banker here; but as a matter of fact the leading drawers who sell bills here on foreign bankers do not stamp them, and no attempt has been made to enforce its ruling by the Department. When a stamp is required, the person who issues it is charged with the duty; but any one who receives it is also liable, and as the contract without the stamp cannot be enforced in the courts, it is for his interest to see that a stamp is put on where one is needed.

34. I received for collection a draft drawn at sight and dated August 24th. I presented it on August 19th. Can it be protested for non-acceptance or non payment before the 24th of August?

A. It should not be presented until the day of its date as it cannot be protested until that date is reached.

35. We call your attention to the following item from the papers:

CINCINNATI, July 17.—About one o'clock this afternoon a well dressed gentleman called for two drafts on New York for \$10 and \$12 at the house of H & Co. The tickets were made out by the clerk, and as he was busy he sent the party around to the exchange clerk's desk with the tickets, instead of taking them himself, as is customary. The stranger prefixed the figure 9 before the 10 and 7 before the 12 and then presented them to the exchange clerk, and the drafts were made out for \$910 and \$712 and handed to the party, who immediately disappeared. The fraud was not discovered till the teller returned from dinner. Both drafts were upon the Hanover National Bank, of New York.

i. Could the drawers stop payment by giving the Hanover National notice of the fraud?

2. Could payment of the drafts be enforced by an innocent purchaser, without notice of the fraud? and if so,

3. How can the drawers give such notice of the fraud as will protect them?

A. 1. The drawer can stop the payment without regard to the holder.

2. Payment of the drafts cannot be enforced, but an innocent holder for value can recover the amount from the drawer.

3. There is no way that the drawers can protect themselves. By giving a wide publicity to the facts they may head off the negotiation of the drafts, but if once sold to an innocent buyer, who has had no notice, the drawer is liable.

36. We have had several letters from our correspondents in different States expressing surprise that we allow grace on sight drafts. Will you be kind enough to inform me what States allow grace to papers drawn at sight?

A. Grace on sight drafts is allowed either by custom or express statute in Alabama, Dakota Territory, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana Territory, Nebraska, North Carolina, Oregon, South Carolina, Utah, Wisconsin, and Wyoming.

37. We sell to John Smith a bill of goods on 30 days' time, and at maturity draw on him for the amount. He does not accept the draft, but permits it to go to protest. Can we collect the amount of protest fees of him, supposing him to be a responsible man, or do we lose it?

A. The protest fees are not a legal charge to the said John Smith unless he authorized the draft, and the drawees must pay it out of their own pocket. All that can be collected legally of Smith, besides the costs of suit, are the original bill, with interest from the day it was due to the day of final payment.

38. We frequently receive drafts from out-of-town bankers on New York bankers drawn to the order of our customers and indorsed by them to us. On date of receipt we send to New York bankers, who either make such drafts payable at their bank, or give a check to our order, which we deposit in our bank.

Now, in case original draft had been given up to New York bankers or bank should fail while the check had not been paid, can we hold out-of-town banker and our customer?

Would it be the safest way for us to lodge such drafts with our bank for collection?

A. The payee of a draft or check, who presents it for payment and accepts anything but money therefor, releases the drawer and indorsors from further obligation. This risk may be avoided by depositing the draft for collection on the day of its receipt.

PAYMENT.

39. A, of New York, makes time draft on B, Chicago, which B accepts, payable at A's office. A sells the bill to C. He fails to present it here at maturity, and sends it to Chicago. Having already remitted to A for its retirement, B refers holder to him. The draft is protested before presentation to A, and in justification the holder—who is well acquainted with A and his business location—said that he had a right to assume that A had an office in Chicago, adding further, that the draft having been accepted by Chicago parties payable in New York, A as drawer and indorser, stood released from any liability. Who should pay the protest charges?

A. If the place of payment was so plainly designated as to leave no reasonable doubt as to its location, no protest of the draft could be legally made until after the presentation and demand at such office. In fact, if the holder blundered as would appear, in sending the draft to Chicago and there protesting it, he is not only out of pocket the costs of that proceeding, and also loses his recourse to the drawer and indorser, who are thereby discharged, but he may be thankful if there is no call on him to respond in damage for his error.

40. A time draft drawn to order of self, on a factor, by same accepted, drawer neglecting to indorse, is it still necessary that it should be done?

A. The draft should be indorsed before it is presented for payment, but the payment without such indorsement, the drawer and indorser being the same, has been decided to be a good payment where it was proved that the drawer had full value, and no injury resulted from the omission.

41. If A draws a draft on B, payable to the order of C, and C gets B's acceptance of the draft, and then indorses and discounts it, etc., does A's responsibility cease as soon as B accepts and C indorses the draft. We contend that B and C are all liable to the holder of the draft until it is paid.

A. After acceptance and discount the holder is bound to present the draft at maturity for payment. If default is made and due notice thereof be given, he has recourse to A, B, or C, each and all, for his money; and C, as payee and indorser, has recourse to both A and B if the holder comes upon him. "As between the payee and every subsequent indorsee or holder, the acceptor contracts an obligation, by his acceptance, to pay the bill, at maturity, according to the tenor thereof; and this obligation he incurs conjointly, and *in solido* with the drawer." (Story on Bills, 119).

42. A & Co., with fair credit, make draft at sight on B & Co., of Smithsville, where there is no bank or notary, for \$50, and deposit same in Atlantic Bank, receiving cash for it. Atlantic Bank forwards same for collection to Drover's Bank without instructions as to protest. Drover's Bank forwards same to Market Bank (being the bank nearest to Smithsville) for collection without instructions as to protest. Market Bank misplaces draft which is found a month after, during which time A & Co. fail in business. Draft being found B & Co. are notified by letter from Market Bank of the draft with a demand for payment. B & Co. refuse payment, claiming to have paid the amount in part to A & Co. direct. Draft is returned by Market Bank without protest. There is a loss of \$50, through the failure of A & Co. Whose loss is it?

A. Whatever loss or damage arises from the fact that the draft was not duly presented, and this must appear in the evidence, falls on the Market Bank which neglected its duty. The remaining loss, if any, falls on the Atlantic Bank.

43. Should a draft or bill of exchange be protested for non-acceptance and non-payment under the following circumstances: A B of Danville, Va., draws at 10 days sight on E F, of Richmond, Va., to order of C D. The draft is forwarded through bank to Richmond for collection but cannot be presented to the drawee for acceptance or payment, he being a resident of Hemico county, and having no place of business in Richmond. Have there been any judicial decisions bearing upon the question?

A. The draft cannot be protested, the residence of the drawee being known, unless it is presented either at his residence or place of business. "If the bill is addressed to a party as being in one place, where he has never lived, or if he has removed to another place, the holder should present it at the new or true domicile of the drawer, if he can by diligent inquiries ascertain

where it is." Story on Bills, 235 ; Bayley on Bills, ch. 7, sec. 1, pp. 218, 219 ; Collins v. Butler, 2 Str. R., 1087 ; Bateman v. Joseph, 12 East R., 483 ; Beveridge v. Burgis, 3 Comp. R., 262 ; Browning v. Kinnear, 1 Gow. R., 81 ; Anderson v. Drake, 14 Johns. R., 114 ; Freeman v. Boynton, 7 Mass. R., 483.

44. Is a notary who presents a draft or note at the drawer's or maker's office after three o'clock P. M., entitled to a fee provided the draft or note be paid by certified check ?

A. The notary is not obliged to take anything in payment but legal tender money. If the debtor can tender him this he cannot collect any fees, but he may refuse anything else, and make his own terms if he accepts a check, even if the latter has been certified.

45. A gives Bank of Colorado a draft on First National for proceeds of collection in hands of the latter for him, amounting to \$2,500, and this draft is sent us for collection indorsed by the cashier of the Colorado Bank. We indorse and send it to First National, which refuses to pay on the ground that the money was sent there by another party, and they have not A's signature. Afterward, they offer to pay if we will guaranty the signature. We claim that the Colorado Bank is bound to know that the right party gave them the draft, hence that their indorsement is a guaranty of the genuineness of signature. The point seems to be, who is responsible for a forged signature, the paying bank or the one which first received it ?

A. The indorser is not held to the drawee for the genuineness of the signature of the drawer, unless he gives a special guaranty to this effect. Hence, if the First National paid the draft and it proved a forgery of the drawer's name, they could not recover the money of an innocent holder who had collected it in good faith. Not having the drawer's signature, and having no means of testing its genuineness, their only safety lay in exacting a guaranty before payment. If they paid the draft without it, they did so absolutely at their own risk.

46. A draft drawn in Mexico on a house in New York reads for \$5,000 silver or paper, (5,000 pesos plata o' papel), and is accepted by the drawees in the same terms. At maturity they claim the right to pay in silver, or to settle at the average discount that silver is quoted, buying and selling say 7-8 per cent. The holders of the draft claim that they are entitled to either legal-tender notes or legal-tender silver, or in other words, either greenbacks, national bank notes or the Bland

silver dollars. Both being convinced of their position being right, the matter has been left to your kindness for a decision.

A. The fair presumption, in the absence of a more specific description, is that the payment is to be made in such silver or paper as may be a lawful tender here for that sum of money ; or at any rate, such as would be accepted under a contract here made in such terms. The subsidiary silver coin was never a legal tender in this country for more than \$5 in any one payment, and the act of 1875 expressly declares that trade dollars shall not be a legal tender for any amount. We cannot avoid the conclusion, therefore, that the payment can only be made in greenbacks, or in silver dollars of the new issue.

47. Is a bank warranted in requiring a certified check for the amount of a sight draft held by it, and which had been presented at the payee's office, while he was out ?

A. A bank is under no obligation to take anything but legal-tender money in payment of a draft. If the collector does not know the drawee well, he ought to exact the money or a certified check. Some bank collectors, however, show but little judgment, and refuse a check that is not certified when the standing of the house is such that no such endorsement ought to be required. But it is the legal right of the collector, and he may exercise it at his discretion.

48. At what rate must a pound sterling draft drawn on New York and past due be paid on presentation ? Should it be the current banker's rate of day of maturity, or of the day of presentation ? The former is the law in Europe ; what is the law or custom here ?

A. In this country the rate is fixed on the day of presentation.

49. A draws on B at sight through his bankers to whose order draft is payable. B accepts and in usual course tenders payment to the bankers who decline to mark it paid in such a manner as to show that they, the proper parties, received its amount, claiming surrender of draft sufficient. B holds that possession is not sufficient proof of his having paid to lawful holder. Can B insist on the bankers marking as above ?

A. The surrender of the bill properly indorsed by the payee is all that can be required. If the draft is to the order of the

bankers, it must be indorsed by them or marked "paid," with their signature, otherwise it is not a good payment.

50. A draft drawn on me by a correspondent abroad for ——— francs matures the 8th inst., Sunday, so is payable on Saturday the 7th. It is held by a German banking house. Not knowing how it should be paid, I write there on Saturday asking if a bill of exchange drawn by A B C will be a satisfactory payment? They reply in the affirmative. When I make the tender, one of the principals says that the cashier was wrong in accepting a bill of exchange of another house; that the same should have been settled with them; that he will accept my bill as his cashier said so, but only in case I pay four days interest, as it is after the closing of the foreign mail. I pay the interest demanded under protest, claiming that I have until 3 P.M., to make my acceptance good without regard to foreign mails. Was this not an extortion?

A. If the whole story is told the house had no right to exact the extra interest, and our correspondent has the right to feel aggrieved at it.

51. We hold a draft drawn at 30 days' sight against B & Co. How can this house claim 30 days' grace, they being recognized as bankers?

A. The statute of New York forbids grace on all sight drafts, no matter on whom drawn; and on all time drafts which appear on their face to be drawn "upon any bank, or upon any banking association or individual banker, carrying on banking business under the act to authorize the business of banking." This does not apply to private banking houses, but only public banks and bankers doing business under the old State law who were authorized to issue bank notes, and were legally recognized as banks of deposit, discount, and issue. An "individual banker" might start a bank under the statute, by conforming to its provisions, but the term has no application to a private capitalist carrying on a private banking business.

52. B, doing business in Cleveland, asks the privilege of drawing at sight for \$1,000 on A, doing business in New York, and for which B promises to remit his check to reach A by the time the sight draft is presented for payment. B fails to remit the promised check, but A nevertheless pays draft on presentation on April 9th at one o'clock P. M. B, doing business in Cleveland, failed and made an assignment on April 9th (same day) at an earlier hour than that at which draft is presented, but A has not been informed of the failure and assignment.

In the ordinary course of the mail the proceeds of the draft paid could not reach Cleveland before some time on the 10th, the day following the failure and assignment of B. Can A reclaim from the bank at Cleveland the proceeds of such draft, allowing for the possibility of the bank permitting B to check against said sight draft?

A. If A had given no assurance to any person in Cleveland so as to add to the negotiability of the draft, he can stop the money he paid after B's failure at any time before it reaches the hands of a holder for value, if no telegraphic or other announcement of the payment has been used to the prejudice of innocent parties.

53. ALA.—What time is allowed the payee of the following described drafts, under the laws of Alabama, to answer whether they will be accepted or paid:

1. Pay to order Richard Roe one hundred dollars and charge to account
Jno. Doe.
To Henry Smith, Mobile, Ala.
2. On demand pay to order R. Roe one hundred dollars and charge to account
Jno. Doe.
To Henry Smith, Mobile, Ala.
3. At sight pay to order R. Roe one hundred dollars and charge to account
Jno Doe.
To Henry Smith, Mobile, Ala.
4. At three days' sight pay to order R. Roe one hundred dollars and charge to account
Jno. Doe.
To Henry Smith, Mobile, Ala.
5. Thirty days after date pay to order R. Roe one hundred dollars and charge to account
Jno. Doe.
To Henry Smith, Mobile, Ala.

Can the holder demand an immediate answer, or is the payee allowed a certain time in which to make reply?

A. The Alabama statute contains a provision identical with that in New York, making the retention of a bill for twenty-four hours without acceptance or refusal to accept equivalent to acceptance; and this provision is in such conformity to the commercial law on the subject that it is safe to conclude that in Alabama, as elsewhere where that law prevails, the payee of a bill requiring acceptance has twenty-four hours for consideration. It, therefore, becomes a question whether the bill is payable on demand, or the payment is after the usual grace. In Alabama bills of exchange, etc., payable at a bank or private banking house, are governed by the commercial law, except so far as the same is changed by the Code—Rev. Code, sec. 1833.

Alabama Supreme Court in *Hart v. Smith*, 15 Ala., 807, reluctantly conceded that sight bills were entitled to grace. As the Court only decided this point, by constraint, under the influence of the authorities, it is a good inference that on a demand bill, where the authorities are the other way, or divided, grace would not have been allowed.

The commercial law recognizes a distinction between bills as to grace, and where time bills and sight bills alike carry grace, bills on demand or payable at no special time or sight do not carry grace. Under this distinction Nos. 1 and 2 of the foregoing bills are not entitled to grace, and are therefore payable on presentation without privilege of delay; while Nos. 3, 4, and 5 are entitled to grace, and if the drawee demands it, when presented for acceptance, he may have 24 hours' consideration without prejudice. When he does accept after such consideration, the acceptance dates, however, from the time of original presentation. The holder, in acceding to the demand, may leave the bill, or a copy of it, at his option, with the drawee. If the bill is left, and the drawee does not return it in 24 hours, he is held to have accepted it and must pay it.

54. MASS.—Do or do not sight drafts on Boston from this carry three days' grace? If they do, does this usage extend further than Boston, and how did it originate?

A. In Massachusetts grace is allowed on sight bills by an act of the Legislature, and it is therefore an old custom now sanctioned by law.

55. OHIO.—Will you state whether a draft upon a man in Ohio, at one day's sight, carries three days' grace or not?

A. If it appears on its face to be drawn by a bank, banker, broker, exchange broker, or banking company, it will not bear grace; otherwise it will. (Laws of Ohio, 1875, page 62.)

EXECUTORS AND ADMINISTRATORS.

1. A leased of B a farm from April 1, 1878, to April 1, 1879, at a yearly rent of \$750, of which \$350 was to be paid April 1, 1878, the remainder April 1, 1879. Default was made, and only \$40 of the first \$350 was paid. In October B died and an administrator was appointed. A clause in the lease permitted B to sow a certain field with

winter wheat and to harvest the same in July, 1879. In view of the default in rent can the administrator hold the winter grain?

A. Prior to the Code, the counter claim for rent due in the decedent's lifetime could not have been set off against the administrator in an action to enforce his right to reap the grain, but sec. 506 of the Code gives the right of set-off in such a case. As, however, the value of the grain, if reaped by A, must be credited on the rent, he should keep a strict account of expenses in harvesting, the field etc., in order to render such an account to the administrator.

2. An administrator (who is also one-fifth owner) of an estate desires to eject a tenant without cause and against the wish of the other owners. Would the tenant be justified in refusing to vacate premises having consent of four of the owners to remain (two of owners being minors, i. e., 17 and 19 respectively), and can the tenant under the circumstances be dispossessed by legal process?

A. An administrator does not control the real property of his intestate. The majority in interest of the tenants in common, being in possession, can lease the property, and the dissatisfied minority cannot eject the tenant.

3. I have been appointed by a Judge of Probate of the State of Connecticut administrator to settle an estate there. I am trying to get a settlement with one of the parties. He purchased a piece of property of the estate I am settling and has made several payments, but there remains the amount of \$160 still due. I hold the deed to the property, but he has had the use of it since the first payment in 1865, the last payment in 1874. Now I am desirous of closing the estate, and have offered him a deed to the property if he will pay the amount due. He declines to accept it or to pay the difference. Can I advertise the property and give the deed to the highest bidder, the first party forfeiting what he has paid?

A. It will be necessary, unless the order appointing the administrator confers the power to sell the real estate in question, to obtain specific authority from the Probate Court, or a court of equity, in order to convey the title away from the contract purchaser. If the court of equity is resorted to, the rights of the present occupier of the property may be determined in the same proceeding. If the administrator sells to another person without these formalities he exposes himself to the costs of a suit by the party now in possession, if he is disposed to dispute the question.

4. What is the law in regard to advertising by administrators of estates? For how long a period must the advertisement appear? In how many papers, and the number of times in each? Is it obligatory where there are no debts whatever against the estate? In the present case the estate is a small one, and it is necessary to incur as little expense as possible in settling it. I have applied to several persons for information on the foregoing, and have in each case received different replies.

A. The object of the statute providing for the publication of notice to creditors to present their claims seems to be the protection of the executor or administrator, and the provision is that they "may" advertise. It has been ruled that where a statute intends to impose a duty, this word is substantially the same as *must*; but the statute in this case rather seems to accord a privilege than to impose a duty, and if this view is correct, and the administrator or executor is willing to run the risk of unsuspected debts turning up, he need not advertise at all. If he does, however, it must be in such papers, once a week for six months, as the Surrogate shall direct, and application must be made to him for an order.

5. When a husband dies in the State of New York, leaving ample means in cash to pay all his debts, but the widow, not taking out any letters of administration, refuses to do so, what steps can be taken to oblige her to pay?

A. Application may be made to the Surrogate to appoint an administrator, and this will doubtless induce the widow or other parties to come forward and accept the responsibility. If it does not, the Surrogate will make the appointment, and the administrator can possess himself of the property.

6. A, B, and C are partners doing business as A & Co. C furnished all the capital. After doing business nine months C dies. A & B, who are insolvent, turn over the stock of goods to C's administrator, who takes possession and advertises a sale of the stock as administrator. In the stock is a barrel of whisky. The revenue collector decides that the whisky cannot be sold unless the administrator takes out a wholesale liquor dealer's license. The late firm A & Co. have a retail license allowing the firm to sell less than five gallons. The revenue agent says the whisky cannot be sold even under this license by the administrator. Is this law?

A. If the revenue authorities insist we suppose they can prevent the sale of even a barrel of whisky belonging to an

estate by any one except a licensed dealer. The law applies to whoever sells or offers to sell distilled spirits. It would also be within the law to prevent an administrator of the estate of a partner from utilizing the license of the firm to which he belonged for the purpose of making the sale. The sale may be made, we should think, through some licensed dealer in the place without much trouble to the parties interested.

7. A died bequeathing by will the income of his estate to B. After B's death the will directs that the estate shall be divided between C and D. The question arises from which shall the executor's commissions be drawn, from the income of the estate or from the principal?

A. Commissions are payable by the estate, rather than by the legacies made a charge upon it; and though in the above case both the interests are legacies, the principal seems to us to occupy the position of the estate proper, liable for all expenses incurred in the settlement of the estate.

8. What are the duties of an executor, one appointed with another to settle an estate?

A. The executor is the person to whom the testator by his will confides the administration of his personal estate, and his duty is to discharge this trust in accordance with the directions of the testator and the laws of the commonwealth. The will is offered to the Surrogate for probate, the executor or executors qualify by the usual oath, take out letters of administration, and proceed in the execution of their trust.

9. There are two persons having a house left to them by a relative; the will said the house should be sold and the proceeds divided equally between the two heirs, but as the house would be at a sacrifice if sold now, the heirs agree to wait until a good opportunity occurs to sell. One of the two heirs who is executrix of the above will, and now living in the house, claims she can live in the house without paying rent (only paying expenses such as taxes, etc.), while the other heir, who is living elsewhere derives no benefit at all from the house. A portion of the house was rented to another party for one year by the deceased relative. The executrix also claims that the other heir has no voice in the matter at all, and that she can do as she pleases about selling, etc.

A. On a final settlement of the accounts of the executrix she can be required to give an account of the rents and profits while the estate was under her management, and pay rent for the part

occupied by herself. It is true that she alone has the power to sell, but if she delays unreasonably the other heir can compel her to carry out the provisions of the will.

10. On the 8th of October, 1872, A signed a subscription drawn up in the usual form, for the purchase of a sight and the erection of a Church thereon. On the 2d of May, 1876, the sight having been purchased, but no Church erected, A made the following indorsement on the back of said subscription :

"For value received and for the purpose of carrying out the intention of erecting a Church as within — mentioned. I hereby renew my subscription, and bind my heirs and assigns in case of my death to pay the same. Signed, A."

In March last A died. Is A's estate holden for the payment of his subscription ?

A. The estate is holden, as far as we can see, for the payment of this subscription.

11. My mother made a will some four years before her death giving her property to my sister. Prior to her death, on the day even, she gave to and delivered her notes and bank book to A, her only daughter, in presence of witness (her husband). Now the question is, can the executor of the will made four years ago bring suit and recover of A this property ?

A. A will operates only upon property which the testator possesses at the time of death. If, therefore, the delivery of the notes, etc., to A, by the testator during her lifetime, was accompanied by words signifying her intention to make a present gift, and they were so accepted, A has a perfect title, which the executor cannot disturb.

12. In the year 1870 A died, leaving behind him four small children. Previous to his death a lawyer was called in to make out his will, which he did. He appoints an executor and also guardian (the same person) to take charge of his children. The will provides that all his personal property is to be divided equally among his four children, they to receive their share when each one reaches its twenty-first year. One of the children reached the years specified last year. He called on the executor, who told him he would have to wait another year, which has passed. He asked him (the executor) last month to pay him, and he told him the lawyer who drew up the will was in Canada on vacation, and that he would not be back until the fall. What can be done to obtain his share ? Must he wait for the lawyer to return, or can he procure one and have it settled ? Can he close it without a lawyer, say, for instance, a notary public ?

A. A notary public could afford no help and we fear that no compulsory measure could be employed without the assistance of a lawyer. But where a trustee is so manifestly derelict in his duty as in this case, there may well be other points in his management which would repay examination under a legal microscope. There is no doubt that he can be compelled, by legal process, to pay over the fund instantler, with costs; that is, as soon as judgment can be obtained; but if he is obstinate, more or less time may be consumed in getting judgment, and if a positive promise can be obtained that he will pay over on the close of his lawyer's vacation, it may be the part of prudence to wait, rather than to enter on a course of litigation, from which the costs obtained from the derelict executor will by no means save our correspondent's pocket harmless.

13. A and B are joint executors of a will. A borrows \$5,000 from the estate, and gives a note with himself, C, D, and E as makers payable to order of A and B executors, and indorsed by F. Can the estate recover on such a note, and is not A liable on his bond as executor to the estate the same as for other funds in his possession. The money borrowed by A has been used in his private business. A reply with references will much oblige a subscriber.

A. There can be no question about the right of the estate to recover on the note; but if it be uncollectible, the executor is liable on his bond. In Williams on Executors, 6th Am. Ed., 1914, it is said "although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established in equity, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust, and shall be personally answerable if the security prove defective."

14. A and B are joint executors of a will. There was due them as such executors a note for \$5,000.

A collects this note and in place thereof executes his note with C, D, and E as securities, (who appear to be joint makers on face of note,) and F as indorser, payable to A and B as executors for \$5,000.

A and B, as executors, sue A, C, D, E, and F on the note at law. E and F are defending.

1. Can plaintiff recover?

2. Is not the contract as to A void at law? If so, can it be enforced against his sureties?

3. Is not the contract absolutely void as against public policy?
4. Does the law recognize as valid a contract based upon a loan of trust funds by a trustee to himself?
5. Is there not a total failure or want of consideration?

A. We know of no rule of law which would render an obligation given by an executor to his co-executor void on account of the relations of the parties, though such transactions are viewed with suspicion by the courts, in order to make sure that no undue advantage is taken. The case of *Forbes v. Ross*, 2 Cox's Chancery Cases, 113, was one of this kind, where one of the executors, contrary to the express direction of the testator, borrowed the money on his own bond to a co-executor, at 4 per cent. interest, when 5 per cent. was the rate obtainable elsewhere. The Lord Chancellor held that the executor was chargeable under the circumstances with the higher rate of interest, observing that "wherever a trustee contracts with himself he cannot spare himself."

In the case of our correspondent, however, if the executor A alone had the money, and the sureties and indorser had no benefit from its employment, there seems to have been no consideration for their promise. We know of no decided case to which we can refer our correspondent on this point, nor should we, in arguing such a case before a judge, consider it necessary to seek for one. The general principles as to what constitutes consideration are well settled. If the sureties received no benefit or value for their promise, then it must be shown that the promisee or some third party either parted with some value, or surrendered some benefit, or undertook some obligation, in consequence of the promise. But the executor was already responsible for the money in his hands, and he was liable for any profits he might make in its employment; and he therefore did not assume any additional liability in giving his note. We think, therefore, that the guaranty was without consideration, and voidable at law so far as E, F, etc., are concerned.

15. As an executor of an estate I am presented a bill by a physician for professional services from January 1, 1865, to date. In the meantime no previous bill has been presented. Will I have to pay the bill as presented, or how much will the laws of this state (N. Y.) compel me to pay?

A. The physician must render, if required, a bill of particulars, and only such fair and proper charges as can be brought within six years can be legally collected. A physician's bill is not such a mutual running account as may be reckoned from the last established item, according to the revised code of laws in this state, (N. Y.) so as to escape the statute of limitation. The following are sufficient authorities on this subject: "I apprehend that to meet the requisition of the code in this particular * * * there must be cross demands, matters of set-off, or counter-claim under our code, something upon which the other party could sustain an action."

"We notice that the section of the code has introduced the additional words, 'where there have been reciprocal demands between the parties.' This is nearly the language of Dennison, J., in *Coles v. Harris* (Bull, N. P., 149). 'There must be mutual accounts and reciprocal demands.' This case has always been treated as law." Hoffman, J., in *Peck v. The New York & Liverpool United States Mail Steamship Co.*, 226 Bos. (N. Y. Superior Court, General Term).

In *Perrine v. Hotchkiss*, 2 T. & C., 370 (N. Y. Superior Court 1873), the Court said: "The exception in the statute made by section 95 referred to, does not and was not intended to embrace mere cross demands. The items which are saved by the statute must constitute a part of an actual account, which must not only be mutual, but open and current—that is, unliquidated."

16. A party dies and leaves \$50,000 cash, and by his will appoints four executors, and directs that this \$50,000 be invested in four per cent. United States Registered Bonds for the benefit of his wife and children, with the understanding that the executors shall hold them until 1890. Should these bonds be issued in the name of the deceased or in the name of the four executors?

A. The bonds should be issued in the name of the estate.

17. Can an heir whose portion of an estate has been left in trust to the executor, require from said executor and trustee, a yearly accounting, and exhibit, if he wishes it, his securities?

A. The heir cannot require such a yearly account. If the trust is being mismanaged, or the property wasted or misapplied,

a bill in equity may be filed, and sufficient cause be shown, an accounting might be ordered and the trustee removed.

18. Can an executor of an estate be held accountable to the heirs for the rent of buildings, even though the tenants, as well as their (the tenant's) bondsmen fail to pay?

A. An executor is only responsible for due caution and diligence, and does not guaranty the solvency of the tenants on the estate.

19. Please inform me to what legal fees the executor of an estate is justly entitled under the laws of this state (N. Y.).

A. The fees of an executor are five per cent. for receiving and paying out all sums not exceeding \$1,000; do. two and a half per cent. all sums between one thousand and ten thousand; do. one per cent. all sums over ten thousand dollars. Beyond this, such allowance for proper and actual expenses as shall appear just and reasonable.

20. Can an administrator move on an estate that he is acting as administrator for, and farm it to suit himself, put improvements thereon, and bring in a bill for the same without the consent of the heirs, and compel them to pay the same?

A. If an administrator thus deals with an estate he is liable to pay the highest rent which might have been obtainable for it, and he cannot compel the heirs to pay for any improvements, without the order of the Surrogate.

21. In the month of April, 1874, I sold a piece of property to S and took a joint and several note signed by the said S and W (his father-in-law) payable the first day of April, 1875. It was verbally understood at the time the note was given that I should not hurry them for the payment on the note for some years after it was due, if not convenient for them to pay, providing they paid the interest promptly on the first of April each year. They paid the interest due both in April 1875 and 1876; S was insolvent when he signed the note, but W was perfectly responsible. S lived in the house with W at the time. W died last fall, but before he died he willed all his property both real and personal to his daughter (the wife of S) and she refuses to pay the note or interest, and S is not responsible for a single dollar. Can I collect the amount of the note? If I can, please state the course to pursue, and confer a favor on a subscriber.

A. The estate of W is liable for that note; and however disagreeable it may be for the daughter to comply with the demand,

she will be compelled (this is both law and equity) to spare the amount. The claim is to be collected like any other by suit if the executor of the will refuses to allow it.

22. I am an executor of an estate. In settlement of a claim due the estate I have received a note payable to my order as executor, which I indorsed as such, and turned over to the legatee, getting his receipt for the same. Now, in case the drawer of the note fails to pay it at maturity, am I personally liable, and can I be sued as indorser?

A. A very good authority cautions all persons signing or indorsing notes as agents, executors, or trustees, to take care if they wish to exempt themselves from personal liability, to use clear and explicit words to show that intention. The best way is therefore to indorse "For the estate of John Smith, James Brown, Executor." In the case above cited, the note being given for a debt due the estate, made payable to the executor, and by him indorsed over to the legatee who gave a receipt for the same, and must have known the source and object of the obligation, the receiver and his assigns would probably be held by the courts as estopped from any claim on the executor personally, if the note should not be paid; provided always that the executor had authority under the will to settle a claim with a debtor of the estate in such a fashion.

23. Please inform me through your valuable paper if a son 19 years of age can be one of the executors of his father's will?

A. No person under age can act as executor; but if he is named, and becomes of age before the estate is settled, he may then, on application, be included in the trust.

24. What are the requisite legal notices to be given for the protection of an administratrix and her bondsmen when a person (widow) dies in the state of New Jersey, leaving three heirs, one a minor? The property is in the state of New York; letters are taken out here, there being no property in New Jersey, but possibly debts due there.

A. The estate being in New York and letters being taken out here, the administratrix's responsibility is determined by the law of New York. In order to protect herself against claims of creditors not presented or ascertained, she must procure an order from the Surrogate designating the papers in which notice shall be published, once a week for six months, after which she will

not be responsible to a creditor of the intestate except to the extent of the assets, if any, which remain in her hands.

25. Will you be kind enough to inform me what interest an executor of an estate is, by law, required to return to the heirs or legatee, supposing, of course, that no allusion to rate of interest has been made in the will? Can he be required to pay legal interest, or only so much as the funds may earn when carefully and prudently loaned? The legal interest in this state (N. J.) is now 6 per cent., but it would be impossible to invest safely any considerable amount, and obtain over 4 or 5 per cent. over and above taxes. Again, suppose the estate safely invested, earned more than legal interest, are the heirs or legatees by law entitled to it?

A. An executor is bound to pay the full legal rate of interest (and more if the money has earned more) on all cash belonging to the estate which he may have appropriated to his own use. He may also be required to pay legal interest on all money retained in his hands beyond a reasonable limit of time, six months being usually regarded as the limit. Where the character of the investment is not legally directed by will, statute, or order of the court, the executor is required only to use a wise discretion, and to pay over only what the money actually earns. The latter he must pay, whether more or less.

26. Mrs. S. purchases a tract of land, about 91 acres, for which she has a deed giving the bulk and bounds all right, and soon after sold about 25 acres of the same. Mrs. S. has now died, and her administrators sell the remainder, 66 acres, belonging to her estate, and Mr. W. purchased it for \$1,600. He has \$800 to pay and wants to borrow \$800 on bond and mortgage. Would his deed from the administrators be good, and the bond and mortgage hold the land of 66 acres without having it surveyed, and the butts and bounds written in his deed and the mortgage he gives?

A. If the administrators have the right to sell, the title from them is sufficient as a good basis for the mortgage security, without a survey or further minute description of the property.

27. What time does the law allow an administrator to settle up the affairs of a deceased person, and whether he can be compelled to sell the personal property of a perishable nature of such person to pay his debts before the expiration of the time allotted by law?

A. An administrator has 18 months from the time of his appointment before he can be required to account. But on the

application of a creditor, the Surrogate may order him to pay a particular debt at the end of six months, by the sale of property, perishable or otherwise.

28. Some time since I saw a statement that when a testator in his will desired that his executor should not be compelled to give bonds, notwithstanding his being a non-resident, if doing business in the city the Surrogate would waive the right to demand it. Since then a prominent lawyer has said that this was not the case.

Has an executor the right to sell real estate, if the testator direct that his whole estate shall be divided among his heirs, without a special power to sell?

A. The following is chapter 657 of the laws of 1873, amending the Revised Statutes:

If any person applying for letters testamentary be a non-resident of the state, such letters shall not be granted until the applicant shall give a like bond; provided, however, that such non-resident executor may receive such letters without bonds, if the testator, by words in his last testament, has requested that his executor be allowed to act without giving bonds, and if such executor has his usual place of business within this state (N. Y.).

The executor has no right to sell the real estate without a power conferred by the will; whether such a power is conferred or not cannot be determined without inspection of the exact language used by the testator.

29. Ten or twelve years ago a gentleman died, leaving his property by will to be equally divided between his two sons, with a life interest in the estate to his widow, and named the sons in the will as executors. Some years after the widow died intestate, leaving an estate derived from a life policy on her husband's life, and the accumulations of interest from the estate. The executors have kept both interests undivided, treating it all as one trust. The two executors are now the only heirs, and they prefer to allow the property to remain as it is in the name of the estate, as there would be some difficulty in agreeing to what would be an equal division without selling the property, which they do not care to do. Is there any law compelling settlement of an estate that would affect our case, and what is the responsibility attached to us as executors or individual legatees?

A. As long as the debts are paid and the sole legatees prefer to keep the property undivided, there is no objection, legal or moral, to such a course. In case either of the executors should waste the estate beyond his own share in it, he could be held responsible, but otherwise he incurs no risk.

30. An administrator being appointed by the Surrogate for an estate, the heirs consenting, and they being all of age, should not the

administrator divide the amounts received pro rata, rather than invest for their benefit, they having as good a chance to invest for themselves as he has ; and must he have an order from the Surrogate before he makes any division ? He says he cannot divide without an order of the court. Can he not be required to settle up before the 18 months allowed by law, when he can convert the assets into cash at once ?

A. An administrator cannot be required to distribute the estate in his hands until the lapse of a year from the issue of letters to him. After that time, the persons entitled may compel him to pay their shares, on tendering him a bond of indemnity, with sureties approved by a court or judge, conditioned to refund the ratable amount that may be required in case any unsettled debts against the estate shall afterwards turn up.

31. ILLS.—Are we entitled to interest and at what rate on a claim against a solvent estate in Illinois, the executor of which takes the legal time of 18 months to settle it ? If we are entitled to interest, are we so from the date of maturity of claim or from the time the executor qualified.

A. The Illinois statutes are silent on the precise question raised, but they allow interest on liquidated accounts, and as the administrator is required to fix a term of court within six months after qualifying, at which claims may be presented and adjusted, it seems a fair conclusion that from that time, at all events, they will bear interest. But if the claim is in the form of a note or other adjusted account we think it will carry interest from maturity. The rate is 6 per cent. where not otherwise stipulated.

32. MD.—What length of time is allowed executors by the law of Maryland to settle an estate ? Also, what remuneration can they lawfully claim for making such settlement ?

A. The allowance of commissions to administrators and executors is left by the Maryland law, with a maximum and a minimum limit, to the discretion of the Orphans' Court. In the former case it is not to be under five or above ten per cent. on the amount of the inventory, and we presume the same rule would be applied to executors, though they are not specially named in the clause. If anything is bequeathed to the executor, however, by way of compensation, no allowance of commissions shall be made unless the compensation shall appear to the Court to be insufficient. Administrators are required to render their

first account within twelve months after the date of their letters; in the case of executors the matter appears to be in the discretion of the Court.

33. N. J.—About 10 years ago Captain K. died, leaving his property to his five children, equal shares to each. The shares were to be paid to all except one daughter, whose husband was not as trustworthy as he might have been. Her share was left in trust with the executors, the interest to be paid to her during life, and at her death the principal to be divided among her children. One executor seemed to take the whole management of the estate, as the others seemed to have no desire to interfere, though they were both interested. The managing executor, after mismanaging things generally for the estate, died about two years ago, and one of the other executors took charge of this daughter's trust fund. It has lately been discovered that the greater part of this fund has lain in his hands since last April without being invested, and his answers have a great deal of the "what-are-you-going-to-do-about-it?" about them. Now I would like to know if he cannot be forced to pay interest for this time, or if the money cannot be taken from him and another trustee appointed by the courts? The estate was settled in Hunterdon county, N. J., and the trustee, who is a resident of Pa., says that the court will not allow him to invest it in anything but first mortgages on real estate, though there was nothing said about the manner of its investment in the will.

A. The N. J. law makes it the duty of executors and other trustees to apply to the Orphans' Court for direction as to the investment of funds in their hands, and if they fail to do so, they shall be accountable for the interest that might have been made thereby. In Pa. the Orphans' Court is authorized by law, on application by executors, &c., to direct investment in various securities besides real estate; and on proof that any trustee is wasting or mismanaging the estate he may be removed by the Court. So, whether the trust funds remain in N. J., or have been transferred to Pa., there is an adequate remedy for the testamentary trustee's mismanagement.

34. N. J.—What time has an administrator of a deceased person to settle up the estate in the state of New Jersey?

A. The following section of the N. J. Revised Statutes, 1874, p. 524, answers the above question—96: "Every executor, administrator, guardian, or trustee under a will shall state and settle his account in the Surrogate's office within one year after his appointment, or at the first regular term of the Orphans' Court

after the expiration of said year, unless the court, for good cause shown, allow further time therefor."

35. VA.—What is the length of time allowed by law for executors to settle the estates of deceased persons in the state of Virginia?

A. So far as disclosed by our study of the Va. statutes, they contain no special limit of time within which an executor or administrator must settle the estate. Such being the case, he can be required to account only by a decree of the Probate Court, at the instance of a creditor or distributee.

EXPORTS AND IMPORTS.

1. In making the calculation of the cost of goods imported for the purpose of ascertaining the profit or loss, is it not necessary and proper, in addition to the European cost, to add the duty, freight, and all other incidental charges, and thus arrive at the aggregate cost, which has to be deducted from the sale of the goods, rendered net cash by taking off the customary discount, in order to arrive at the exact profit or loss of the operation?

A. If the goods were sold in bond, the European cost, freight, insurance, etc., would be sufficient, but if sold duty paid, the latter must certainly be added to complete the cost.

2. We bought 30 cases glass tumblers with the condition to have on the invoice gross and net weight. We shipped these to Havana where the import duty on these, as on many other articles, is payable by weight, and importers here pay duty on the weight they declare. The seller stated on the invoice the weight 50 pounds more than the actual weight. Our consignee to whom we gave the weight as we found it on the invoice had to pay more duty there. Can we recover what is claimed from the seller?

A. We do not think the buyer can recover of the seller the damage he has received through such an over statement of the weight. He might claim for short weight if the invoiced weight was warranted, but the connection with the extra duty is too indirect for recovery.

3. I order goods from Germany or France under a credit on London. The goods are deliverable in London, *Franco-Londres*. Do I or does the seller insure the goods to London? That is, at whose expense is such insurance properly to be? Are the goods in possession of the seller until delivered in London, the draft not been previously accepted, or are they at buyer's risk on shipment, freight prepaid?

A. The seller insures at his own expense, or runs his own risk up to the point of delivery during which time, also, he has control of the goods.

FREIGHT.

1. On a bill of lading over several railroads and a steamship company, is a consignee liable for the proportion of freight, in case the goods are destroyed on the vessel, up to the time of its destruction, the contract to deliver goods at destination not having been completed?

A. The consignee is not liable for freight unless the goods are carried through as directed and delivery tendered.

2. In the case of a claim for freight per package on casks from which sugar has been washed by causes exempting the vessel from liability for the same we have been told that the carrier may collect without abatement if any of the contents remain in the package. May we ask your opinion in such a matter; and also inquire if, in your judgment, freight is due if the package be landed entirely empty of sugar?

A. In case of *Frith v. Baker*, 2 Johns. R., 827, 50 hogsheads of sugar were shipped at freight. They were properly stowed, but during the voyage the ship leaked, owing to tempestuous weather, by which the sugar was washed out and on the arrival of the vessel the hogsheads were emptied and some fell to pieces. The Court held that no freight was due. If the sugar is delivered no matter how worthless it may be, or how damaged its condition, the freight is thus far due; but if the contents of the casks are wasted by the perils of the sea, so that only the remains, or waste, are left, no freight on such can be collected.

3. A forwarding merchant here received goods from Europe for an inland house, subject to advances and charges. How long must he keep them if charges are not paid before he can sell them, and under what formalities can he do so?

A. If the goods are perishable they may be sold at once. If not perishable, and the shippers authorize it, it may be safe to sell the property after the refusal of the inland house to receive them, but the decisions all require a notice to the party interested of the time and place of sale. If he cannot be found after a reasonable time, public notice by advertisement, and a public sale, would clear the holder of legal liability.

4. A steamboat gives a bill of lading before reaching her point of destination, she meets with an accident (snags), and to save the boat, etc., throws overboard a part of the cargo ; is the boat entitled to the freight money on that part of the cargo thus lost ?

A. The vessel is not entitled to freight on that part of the cargo lost, save in general average, same to be paid pro rata by the property benefited through the sacrifice ; but cargo saved in a damaged condition earns full freight.

5. A ships some apples to Hamburg, and owing to their perishable nature is required to prepay the freight. The vessel is lost and apples consequently not delivered. Can A recover what he paid as freight ? Is it within the power of the owners of the vessel to enforce payment of freight after loss of ship ?

A. If freight is paid in advance and the voyage is not fully performed, the shipper can claim and exact a return of the money unless there is a special agreement to the contrary. *Watson v. Duykinck*, 3 Johns., 335 ; 1 Peter's Adm. R., 207 note ; *Detouches v. Peck*, 9 John. R., 210, and many others. There is a form of contract which provides that the freight shall be deemed to be absolutely due to the shipowner at the time of its prepayment and not in any degree dependent on the contingency of the performance of the contemplated voyage, and the entire fulfillment of the contract of carriage ; where such a contract is made in clear and express terms there can be no recovery ; but without it, the shipowner is bound to refund the money if he fails to carry and deliver the goods as promised.

6. I purchase cotton largely at the South, say I buy 100 bales at Jackson, Tenn., and the party who agrees to transport same signs a bill of lading guaranteeing that said cotton shall be landed at its destination for a certain specified rate. The amount of the freight is figured and deducted from the gross invoice and the balance paid by draft several days before the cotton arrives. On the arrival of the cotton it is found that the charges amount to several dollars more than the sum for which the bill of lading calls, as it comes from point to point over different roads, each succeeding road paying for the freight already charged, whether it exceeds what they shall pay or not, and take the cotton on to the next point, and so on to the end of the route. Now what I would like to know is who shall make up this over charge ? The delivering company claim that the charges must be paid, right or wrong, and that leaves me so much out ; and I would be pleased to learn if I am obliged to pay over-charge in this way, or whether the railroad and steamship companies ought not to settle

the matter among themselves, and make the charges no more than what they would have been as specified in bill of lading.

A. If the bill of lading was signed by a carrier, and the connections of the line by which the cotton came are such as to make it a through route, the carriers having an agreement among themselves to this effect, the consignee may tender the amount named in the contract and legally insist on the delivery of the property. But if the original contract is made by a forwarder not in the carrying business, and there is nothing to show that the line, as such, came under any obligation as to price, the receiver must pay the charge, not exceeding a fair price, for the carriage, and sue the original contractor for the difference. This excess of charges is a common trick over all the through lines, and many submit to the imposition to avoid trouble.

7. We have a cargo of paving blocks consigned to us from a eastern port ; the vessel arrives in due time and the captain reports to our office and shows his bill of lading signed by him in the usual way. The captain demands the freight on this cargo when discharged as the only one who has a right to collect the freight. On the same day we received an order signed by some one in Bangor, Maine, ordering us to pay freight to a house in South street on said vessel, the order being signed as part owner and agent of vessel. We contend that the order was of no account, not knowing the person who signed it, and that the captain was the only one who could collect the freight so long as he was the master of the vessel and signed all bills of lading, and there had been no legal means used from restraining us from paying the captain ; are we right in paying the captain his freight ?

A. A payment to the master is a good payment under the circumstances ; but if the master will deliver the goods on payment to the " house in South Street," the consignee of the goods will best serve all the parties by complying with this request.

8. A vessel is chartered in P. E. Island to load with a cargo of potatoes for this port, at a certain rate per bushel. She takes in say 4,000 bushels, and lands here, according to Custom-house return, 4,300 bushels ; and on this quantity we, as agents of the vessel, claim freight. The charterer claims that as he bought his potatoes at 65 lbs. per bushel the out-turn should be so reckoned instead of at 60 lbs. per bushel, as is custom here. There is nothing in charter-party or bill of lading in regard to the weight, but simply that the freight is so much per bushel.

A. It is a simple question as to the agreement actually made

by the contracting parties. If both of them had in mind the bushel of potatoes weighing 65 lbs. when they bargained for the freight at so much per bushel, that would settle it in favor of that interpretation, and so if both bargained with the 60 lbs. in view. But if one had in mind the weight at the place of loading, and the other the weight at the port of delivery, then the fair interpretation which would be given to the contract by a disinterested party, in accordance with the general custom, will govern. We cannot say, in the case before us, what the bargain was; but in the absence of any other indications, the weight of a bushel where the potatoes were bought and loaded would seem to have the preference. A natural increase of goods on a voyage, it has been legally settled, does not add to the freight bill. A cargo of pressed cotton so expanded on the voyage that a much larger measurement was turned out than was counted in. The Court held that the freight of "5s. per ton of cubic feet delivered" was to apply only on the measurement as shipped.—*Buckle v. Knoop*, Law Rep., 2 Ex., 125, and 2 Ex., 333, on the appeal. Without other evidence of intent than above given, we doubt if the agents of the vessel can claim for more bushels than were loaded according to the meaning of the word "bushel" at P. E. Island.

9. In receiving shipments from Japan it frequently happens that the measurements (number of feet) are incorrect. It is my habit to have them remeasured here by a professional. A shipment received some time ago, via England, arrived at this port per Italy, of the National Line. I am obliged to pay freight before the goods are released. After paying I find from measurer's return, which are handed to the company, that the bill of lading calls for an excess of "feet" equivalent to about \$100. I ask a return from the company. They say they must ask their London correspondent. To-day they notify me that I must apply to shipper in Japan. I want a more prompt settlement.

A. If the statement in the bill of lading of the quantity is the ordinary one, and not a contract for a specified amount of room, to be paid for whether occupied or not, the shipper in Japan has nothing to do with the controversy; it is to be settled here, between the ship and the consignee. In future, the latter may require the measurement of the goods by the ship before payment of the freight, in order to ascertain the amount due, and he can-

not be compelled to pay, except for the quantity actually carried, unless, as we say above, by virtue of some special stipulation in the bill of lading.

10. Is the shipper in an ordinary bill of lading bound to pay to the vessel owner freight on cargo not worth the freight agreed upon and consequently not received by the consignee at a foreign port, the goods having no commercial value?

A. The value of the goods will make no difference. If the consignee will not pay the freight, the shipper is liable for the amount.

11. A vessel is chartered to load "a full cargo of ordinary lawful merchandise under deck, and two hundred carboys upon deck, for which she is to be paid three hundred dollars on proper delivery of cargo." During the voyage the carboys carried upon deck are washed overboard.

Is the vessel entitled to the full amount of her freight money, when she did not make a proper delivery of the whole of her cargo?

A. The above introduces a question about which there are many conflicting decisions. It has been held as in *Willeys v. Phillips*, decided by Judge Blatchford that, where part of the cargo was lost, nothing was due under the charter party but the captain could collect freight as such, for the portion delivered. We had a case before us in which the charterer contracted to pay a lump sum on the correct delivery of the cargo, but excepted from the obligation the cargo lost by the dangers of the seas. *Leak's Digest*, p. 661, holds that the conditions of the delivery of the cargo upon which payment under such a contract hinges, "does not include cargo lost by perils excepted in the charter party, and a lump sum agreed for freight, becomes payable in full upon delivery of the remainder; without deduction in respect to part that is so lost without default of the master." We decided in that case, although with some misgivings in view of the conflict of authorities, that the whole sum under that contract could be collected, as the loss came distinctly within the exception. In *Bright v. Cooper*, 1 *Brownlow*, 21, it is held that under an ordinary contract, no freight whatever is due where part of the cargo is lost. If the case now mentioned were left to our own decision, the loss being wholly due to the perils of the sea, and

no particular exception being named in the charter party, we should hold that the consignees have the right to refuse the balance of the cargo, and would then be absolved from all claim under the charter party; but, if they accept the portion saved, they are liable in equity for a pro rata freight, deducting from the round sum promised the proper freight of the portion lost. Of course, if the vessel is in fault for the loss of the deck load, the consignees may accept the under deck cargo, and offset the freight against the value of that which was not delivered. We give an opinion of the equities of the case without attempting to predict what the courts would decide as a matter of law in view of the great conflict of authorities, here and in England.

GIFTS.

1. A, during what proved to be his last sickness, loaned to his old and faithful house servant \$500 in the presence of C, and took the note of B to the order of A, payable on demand. Without indorsing the note, A immediately, in presence of B, hands it to C, and tells B if he continues to live with him during his life he may have the note, besides being paid the regular wages, and directs C to keep the note and give it to B at his death if he does so continue to live with him. A very soon thereafter dies, B having continued to live with him. Is it now safe for C to deliver the note to B?

A. The above transaction may probably be supported as a contract, made upon good consideration, viz., B's continued service until the death of A. In another point of view, considered as *donatio causa mortis*, there is a good deal of conflicting law on the question whether or no the unindorsed and therefore non-negotiable note in question is capable of such delivery as the authorities all require in order to make it a valid gift of that nature. Under the decision of the Connecticut Supreme Court in *Brown v. Brown* (18 Conn. R., 417), it appears to us that the delivery was good and sufficient to support the transaction as a gift. The case is not, perhaps, beyond a peradventure; but unless there are debts of the estate existing when the transaction took place, which the estate will not otherwise satisfy, in which case the transfer, considered as a *donatio mortis causa*, would yield to the claim of creditors, we do not think that C would run any appreciable risk in giving up the note to B on the death of his master.

2. My brother died in a Western city and left a property considerably above his debts, to which I am a co-heir. He gave an "IOU" to a church for \$500 as a subscription toward its building. Now, is the estate liable for the payment of that donation? The creditors have severally objected, but the commissioners appointed by the Probate Court have adjudicated in favor of the church. It is paid; but we would appeal if we thought we could succeed. A referee in the matter of the estate of S. & Co., has decided that a donation, through a promissory note, is not good as against creditors in bankruptcy.

A. We think the gift will hold good. Giving an obligation to pay money to a charity when one is insolvent, which was the position in the case quoted, is bestowing the property of others; but giving out of a solvent estate, as we infer the brother of our correspondent did when he made his donation, is such a choice as any man has a right to make in the disposition of his own property.

GUARANTY.

1. John Smith, agent, opens an account with us, giving a written guaranty for payment of all goods purchased on account of "John Smith, agent," to a specified amount.

He after some years gives us notice that on a certain date he will drop the agent, and we fill his orders "John Smith" after that date.

Does our guaranty cover both accounts, it being the same person under different styles?

A. If it were the same account under a different appellation the case might be different, as if the guaranty was given to cover a purchase by J. C. Smith, and he afterwards changed the title to J. Cotton Smith; but John Smith, agent, and John Smith, for himself, may represent a very different liability, and change entirely the character of the risk. We do not believe that the guaranty could be enforced; it certainly could not if the guarantors could show that the risk was changed when John Smith resumed business in his own name.

2. A let his house to B; A required of B to procure two persons, C and D, as sureties for payment of the rent, A having to get the signatures of the two sureties, C and D. A got the signature of C, but neglected to apply to D to get his signature. At the expiration of the time of payment B could not pay; A then said to C that he (C) must pay the amount of the rent. C replied to A that he (C) is not bound to pay anything, as the agreement between the parties says, "We, C and D for sureties," etc., and as D has not signed, the agree-

ment becomes null and void. In other words, D having not signed, says he has nothing to pay, and C says that D having not signed, he (C) also has nothing to pay. Has A, the landlord, to lose his whole rent? If not, who has to pay?

A. The landlord, who by his own act has released D, cannot hold C, and must look to B, or lose his money. Next time he will look a little sharper after his sureties.

3. 1. A buys a bill of goods from us on thirty days and gives us B to guaranty it. B in consequence sends us the following letter: You will please ship goods for A at once amounting to \$500, and if your remittance is not to hand in thirty days please send notice to me and I will give you check for same.

2. C buys a bill of goods on ninety days and proposes to give us acceptance on D; the latter accepts C's draft.

Now, in both cases there is no value or consideration given as to guaranty or acceptance.

A. Our correspondent is entirely mistaken in supposing that the guaranty and acceptance in the cases specified are without consideration. It is not necessary that the person to be held should receive the consideration if the transaction in which he becomes pledged has an actual basis of this character. A wishes to buy goods; he induces B, C, and D to indorse his note, or to give a guaranty that he will pay for his purchase. He presents this security to E who sells him the goods. These furnish the consideration, and E can hold all the parties, although only A received any benefit. B, C, and D are not bound to A, and the latter can recover nothing from them for he has given them nothing for their signatures; but E can hold them for he has given a valuable consideration for the signatures. Thus A borrows B's note (paying him nothing for it) and gets it discounted at bank. A could not collect the note of B, but the bank can, as it has given value for it; and it makes no difference that B received none of the money. So in each of the cases cited by our correspondent the surety is legally held.

4. A bond of \$500 was issued by a town in New York payable in twenty years, interest semi-annually. A sold it to B with the following guaranty indorsed, "Pay to B or order; same guarantied by me, A." B sold it to C. The town failed to pay semi-annual interest; C called upon A to pay interest, giving him notice of dishonor. A called and tendered to C the full amount of bond, which he refused, claiming

he only wanted the interest due. Was, and is C bound to accept of the tender, and can C hold bond, and collect the interest of A?

A. The question whether the guaranty of a negotiable instrument is itself negotiable—that is, whether in this case, A's guaranty is good in favor of C—has been considerably discussed, and has not been absolutely settled in the court of last resort in this state (N. Y.). But the decision of the Supreme Court, Erie general term, in *Cooper v. Dedrich*, 22 Barb., 516, was in the affirmative, and we see no reason to suppose that this case will not be followed, especially since it has been approved by the Court of Appeals on another point. In the belief, therefore, that A can be held on his guaranty, he can be required to pay interest as well as principal, and his tender of the principal alone is insufficient. And, unless by a provision in the bond, the principal becomes due upon default in payment of interest, payment of the bond cannot be made before maturity, without the holder's consent.

5. B inquires from A for references of C in regard to standing, etc. A replies: "The man (C) is good; sell him \$5,000." C fails soon afterward. Can A in any way be made responsible by law for the loss B sustained?

Suppose that A had said: "I would sell C \$5,000," could that little alteration free him of responsibility?

There is a controversy mainly regarding the words used, "sell him," or "I would sell him;" the one party holds that the positive expression "sell him" makes the author legally responsible; the other party says that either expression can be used without making the speaker in any way responsible for the consequences as long as it is only a verbal communication.

A. The words are not sufficient to imply a guaranty in either case, and the speaker assumed no legal responsibility if he had no reason to doubt the correctness of his own statement.

6. A gave a guarantee to B for C to buy goods on it to the amount of \$500. On the 26th of July C makes a settlement with B, giving him five notes for his indebtedness of about \$496, payable in 60 days successively, to wit: September, November, etc., etc. On the 27th of September A revokes his guaranty, having been informed that B has received another guaranty about the 4th of September, when C purchased goods at B's. When does the guaranty of A expire, and is he responsible for the goods bought between the 10th and the 27th of September?

A. As the amount of the guaranty (within four dollars) was outstanding, if the dates are correctly given, when A revoked it on the 27th of September, he is only responsible for the payment of those notes.

7. A discounts notes for B and demands a guaranty from C, and receives such in a written document, stipulating that he will be responsible for all losses occurring for discounting "customer papers" [the document is made in Germany and the expression used is *kundenwechsel*] offered by B to A for discount. B failed and A has discounted notes—some accommodation notes given by B, some fictitious notes made by B, and some customer notes. C is willing to make good the loss on customer paper which remains unpaid. Can C be held liable by A for either notes, accommodation or fictitious, A claiming he took them in good faith and that they were offered by B as customer papers?

A. The German word used to designate the character of discounts guaranteed, is not in general commercial or legal usage, but a literal transaction answers very well to our phrase "business paper." We infer from the statement of the case above that the transactions described, except the execution of the guaranty, occurred here; and that being the case, the contract is one to be interpreted by our laws. Under them we think no pretense can be made that the guarantor is held to make good losses arising from the discount of accommodation or fictitious acceptances, no matter though the bank supposed them to be actual business paper. This it was the business of the discounters (A) to find out, and they made the discounts at their own risk if they were careless or mistaken.

8. Suppose that on January 1, 1879, A sells B a promissory note against C, due three months from date (December 1, 1878,) and guaranties the note good and collectible down to December 1, 1879. The note not being paid at maturity, B sues the maker ten days after it is due. Is the guarantor holden for the payment of said note, if it cannot be got into a judgment till after December 1, 1879, in consequence of not being reached on the court calendar?

A. Due notice being given to A he is held for the note.

9. Will the written continuing guaranty of a wife legally hold her estate for the payment for goods sold her husband on open account? If so give the proper form of such guaranty.

A. It is essential to such a contract by a wife that it must appear to be for her benefit, or else it must expressly charge her

separate estate. The following form of guaranty has been held good: "I agree to be responsible for all such goods as W shall buy of C," to which must be added in the case of a married woman, "and I hereby charge my separate estate with the fulfillment of this obligation."

10. In the following form of guaranty can payment be collected of B if A should fail to pay?

"For value received I hereby guaranty the payment by A of all goods he may purchase of C D for one year. B."

A. The guaranty will bind B as surety to C D for A's purchases during the year.

11. A writes us for some goods, and as his guaranty had his first letter indorsed by Cashier B, of the Bank C, as follows:

A's orders to the amount of 500 dollars are good and will be promptly paid.
(Signed) B., Cashier Bank C.

After one year's transaction of business with A he fails to pay his bills, and we find that he is indebted to us for \$500. Can we hold the cashier yet responsible for the amount? Or was the guaranty intended only for the first transaction?

A. The cashier is not responsible after the first \$500 were paid.

12. A grocer buying goods from us runs up his account to \$700 or \$800 and fails; but one of the firm says that "if he does not pay I will," at the same time sending him more goods. After he fails, the one of the firm who has promised to make his account good pays to the firm \$600, leaving a balance of \$185. Now he is not a member of the firm, and he says he will not pay the \$185. Must we have a written agreement to hold him responsible, or is a verbal agreement sufficient when there are two or three witnesses to it.

A. The claim is good and the guarantor must pay that balance.

13.—

"Ninety days after date I promise to pay M. & Co., or order ten thousand dollars, value received, and we hereby waive all rights, claims and benefits of the homestead and all exemption laws as to this note, with interest at (left blank) from date. Payable at either bank of Savannah, with exchange on New York.
(Signed) JOHN SMITH."

The indorsement on this note reads: "I will guarantee the payment of this note to M. & Co. at maturity," signed Thomas Brown. Is this indorsement enough to hold the indorser at once, if the principal should fail?

A. If the guaranty was given when the note was made and was part of the contract it is binding; if it was done subsequently the guarantor might plead want of consideration. In its terms, otherwise, it is well enough, but to avoid all doubt as to the plea noticed it should read: "For the consideration of one dollar to me in hand paid, I hereby guaranty the payment of the within note at maturity."

14. We have an account against A, and also have a guaranty given by B for said account to a certain amount. If A gives us a note on account indorsed by B, would that in any way affect the guaranty?

A. If the amount guarantied was in excess of the face of the note, we do not see how the acceptance of the latter would injure the guaranty unless it is given with the understanding that it is the limit and settlement of the account to which the guaranty applied.

GUARDIAN.

1. Can a minor whose parents have been divorced and neither of whom claim the guardianship over him, and whose whereabouts are to him unknown, of his own accord appoint some responsible person to be his guardian, with power to give or refuse consent in order to benefit him? What is the form necessary to make this voluntary transfer legal?

A. A minor who is over 14 years of age can appear before the Surrogate and nominate a guardian. The Surrogate will make inquiries, notify all parties in interest, and on the day appointed proceed to confirm the nomination if it appear best. The fees are not large for such a service, and a legal guardian may thus be secured.

2. A guardian has had charge of an estate for a period of ten years; has made no statement within that time, but collected rents and paid all bills; has also let heirs have money for personal expenses. Should the guardian in final settlement allow the heirs interest on balance remaining in his hands at the end of each year, there being quite an amount unused each year?

A. The guardian's duty is not to suffer considerable sums to remain long uninvested (six months is the longest admissible period), and if he does so he is chargeable with interest. If he is obliged to keep money on hand to answer calls from his wards,

that fact would excuse him from the liability to such an extent as the circumstances would appear to justify.

3. Is there a law in the state of New York which allows parents to will away their children at any time before they reach the age of 21?

A. The father, on consent of the mother, or in case of his death and omission to make such appointment, the mother may by deed or by last will appoint any person or persons as guardian of a minor unmarried child, during its minority, or for a less time, and such appointment will stand. The deed may be executed and dispose of the child before the death of the parent, an order for such adoption being obtained from the County Judge, and the consent of the child if over 12 years of age being first secured.

4. In 1873 A & B were sureties on a guardian's bond for C. Prior to the final accounting of C, A died, and B was discharged in bankruptcy. When B filed his petition in bankruptcy his liability as surety was not scheduled. C is now insolvent. Is the estate of A discharged by his death, and is the discharge of B in bankruptcy a perfect defense?

A. Since B's liability as surety could not have been fixed until C's final accounting, it was not a provable claim against B in bankruptcy, and therefore was not released by his discharge. The liability of A's estate depends upon the question whether the bond was joint only, or joint and several. If the latter, the estate must pay. (*Fielden v. Lahrens*, 6 Blatch., 524.)

5. About five years since a minor, born and now living in Iowa, had some money willed her by a relative in this state (N. Y.); I was appointed her guardian, and gave bonds, and now have the funds in trust. She has since arrived at the age of eighteen years, is married, and according to the laws of Iowa has attained her majority. She asks me to hand her money to her, agreeing to sign a joint receipt for the same with her husband, releasing me from all responsibility in the matter.

Would such a receipt be a full release to me for all demands, and would the law of this state (N. Y.) allow me to hand her the funds in this manner.

A. If it is considered as a question settled in this state (N. Y.) by the decision of Judge Daly in the matter of Brick's estate (15 Abb., Pr. 12) that the marriage of a female ward terminates

the guardianship, it would be safe to pay over the funds as desired, but we should hesitate to treat that case as authority for a general rule to the above effect, and therefore think the safer course would be for the guardian to apply to the Surrogate for leave to resign upon the facts above stated, when the Surrogate would either rule that the decision of Judge Daly covers the case, or appoint the ward's husband guardian, in either case allowing the funds to be transferred.

6. Two orphans have money in a savings bank. Can their executrix and guardian (one person) invest the sum in real estate as a home for them? Could the executrix execute a mortgage for any deficiency of the purchase money?

A. The guardian might make such an investment in real estate, subject to her responsibility if it should be an improvident one, unless the funds are now invested by order of court. But to execute a mortgage which would bind her wards, it would be necessary first to obtain such an order.

7. A goes as bond for B who is guardian for an estate. Before the children over whom B is guardian come of age, A sells all his property. Now in what way is the bond secured? Is it recorded against A's property same as a mortgage, or does the court take the risk of the bondsman losing his property?

A. The bondsman is accepted with that risk, but if the security fails the guardian may be required to furnish an additional bond.

HEIRS AND LEGATEES.

1. A husband dies and leaves several children, all of age. The property consists of real estate, bonds and money in banks. What portion of the above is the widow entitled to by laws of New York State, and is her right absolute to dispose of same by will, or must personal be divided to surviving children at her death.

A. If the husband dies intestate, leaving children and a widow, the latter in this State takes one-third interest in both real and personal estate. She is not obliged to save her portion of the personal for the children, but may spend it, or bequeath it to whom she pleases.

2. A man living in New York State loses his wife, leaving children here; he goes out of the State and marries again: he dies

there, leaving no children by his second wife ; at his death he leaves considerable property ; his widow manages to get it in her name after his death. At her death who does the property go to, her friends or his children by his former wife ?

A. If the second wife "managed to get the property in her name" by legal means, the children by the first wife will not inherit. But if the father died intestate and she seized upon the property without warrant of law, there has been no time from that day to this in which the children could not legally recover their share of the estate. Her interest being her dower right, would be her only claim, and that at her death would go to her own next of kin.

3. A dies in Connecticut, leaving real estate and personal property. The former is mortgaged for more than it sells for under foreclosure. The personal property has been distributed years ago. B is a married daughter, who holds real estate in New York in her own right. Will a deficiency judgment on A's bond and mortgage hold as against B, and if so, to full amount of deficiency, or only to the amount received by B as her share in A's personal property ?

A. B can be held liable, at the utmost, to the extent of her distributive share in the estate.

4. B takes a bond and mortgage on a piece of real estate belonging to A ; previous to maturity A dies ; when the mortgage becomes due are his executors bound to satisfy the mortgage from his personal estate, of which there is sufficient in their hands, whether they wish to or not, or has B to foreclose and look to property ?

Also, can a mortgagee sue the bondman on his bond for amount of mortgage without first having to foreclose ?

A. The payment of the bond of the testator secured by a mortgage of real estate is by 1 R. S., 739, sec. 4, primarily charged upon the real estate mortgaged, and cannot be made out of the personal estate, unless by an express provision or a necessary implication in the will. (Redfield on Surrogates, 286 ; Waldron v. Waldron, 4 Bradf., 114.) By consequence, payment of the bond could not be enforced against the obligor in the above case without foreclosure.

5. Does a lot in a cemetery in New York State, descend only to the eldest male heir ? If an interment is made, can the lot be conveyed or sold ? If no will is left disposing of the lot, what process of law is necessary (supposing my first question answered in the negative) to divide the lot *pro rata* among heirs ?

A. Chap. 133, laws of 1847, as subsequently amended, in particular by chap. 245, laws of 1874, provides that on the death of a cemetery lot owner, the lot shall descend to his heirs-at-law (not to a single heir). Either of the heirs may release his title to the other, by a release filed with the Town Clerk or City Register, but in order to a sale for the purpose of division among the heirs, application must be made to a court of record for leave.

6. "A" died leaving some property, a widow, one son and two daughters, but no will. They all drew the interest and divided it. The son dies leaving no will, but it was his express wish that his share should go to his mother. In that case can the sisters claim their part of his share? also, can the widow use the principal in case the interest will not support her?

A. The property of the son will descend legally, one-third to his widow, the other two-thirds to be equally divided between his children. When the son died, leaving no widow nor children, his property is to be divided between his mother and two sisters share and share alike. The mother cannot use the children's share except with their consent, but they may be compelled to support her if she has not sufficient means of her own. The wishes of the son, not embodied in a will, are of no effect.

7. A man leaves the use of property, including a piece of land, to his widow for life, after her death to go to his children. Now can the widow lease the land for say 10 years, and if she dies before the expiration of the time, will the lease hold good? Must the lease be signed by the children as well as by the widow to be valid?

A. The widow can only give to another what she has herself—the right of use during her natural life—and the lessee would have no color of title to occupancy after her death. If the children are of age and joined in the lease it would then be good.

8. By the provisions of a will \$5,000 are to be invested and the income paid to A during her life. At her death the principal sum goes to B. If by fortunate investment the \$5,000 should be increased to \$8,000, to whom would the \$3,000 belong? If the \$5,000 should shrink on whom would the loss fall?

A. The increase having arisen from the enhanced value of the investment securities, and not from regular interest or dividends, it belongs to the principal and goes to B. In case of shrinkage,

it would depend somewhat on the cause. If from improvident investment in securities or property not authorized by law, the trustee might have to make up the loss himself, otherwise B, the remainder-man, would have to bear it.

9. A minor marries against the will of his parents and dies before he comes of age. His father had placed money in savings bank to his name, to be placed at his disposal when he came of age. Who has legal claim to that money, and who to any other effects he may die seized of?

A. If the facts are all stated the father never lost his property in the savings bank deposit, and may therefore reclaim it. As to any property actually belonging to the minor, his widow is entitled to her distributive share, which, in case there are no children, is one-half, the other half going to the father.

10. A partnership existed between two persons, one of whom died last July. Previous to his death, and in accordance with their old business custom, an inventory was taken on the first of July. According to the terms of the partnership the surviving partner had 12 months from the commencement of the ensuing business season to wind up the business and account for his partner's share in it.

1. Now, has he legally to the first of July next, or to the first of January next, to wind up said business?

2. Is the deceased partner to share in the business liable for any debts contracted by the surviving partner, in order to carry on and wind up said business to the best advantage?

3. Have the deceased partner's heirs any interest in the profits and losses of said business beyond their direct interest in the assets as inventoried at the time of his death?

4. Can the heirs, or the person to whom assets were devised in trust for said heirs, make any arrangement for the continuance of said assets in said business, if satisfied that it is for their interest to do so?

5. If so, in what form can they best arrange it so as to render it safe and at the same time be of benefit to the business?

A. 1. According to the contract the surviving partner would have 12 months from about the date of death in which to wind up the business, the "next season," being then the fall season, hardly opened in July.

2. The estate would be liable for its share of losses or debts incurred in winding up the business, and for these alone.

3. In the same way any profits accruing in winding up the business must be equitably divided.

4. If the heirs are all of age, they can join with the trustee of the estate in any arrangement devised for the continuance of the business.

5. No arrangement can be made in which the property can be absolutely safe, and yet be subject to the contingency of trade.

11. John Smith died over 30 years ago survived by his second wife, three children (minors) by his first wife, and several children by his second wife. The last named received possession of all her husband's property, which was small and personal property, and brought up and educated all the children out of the proceeds, thereby considerably decreasing the original amount. She has always had entire control of the money so left her, and is now living on same. Can the children by the first wife at the death of their stepmother (the second wife) claim any portion of the sum that may be left by her out of the money originally received from their father, or leave the second wife's own children a legal right to everything left by their mother?

A. The children are all entitled to share alike in whatever property descends to them from their father's estate. Only the children of the second wife, if she dies intestate, are entitled to any share in her separate estate, if such there be.

12. ILLS.—In what proportions should an estate in Illinois, real and personal, of a deceased gentleman, be divided among three children (adults) and a deceased daughter's child (grandchild), and the widow, a second wife, according to the laws of that State? The four children mentioned are his children by his first wife, he having no children living by his second wife. The widow has three children by a first marriage, the deceased gentleman being her second husband. Do they share in the estate? To complicate matters still more, in the second marriages of these parties, the bride was his deceased brother's wife, so that the children are own cousins and step-brothers and sisters.

A. If the husband died intestate, the widow will take one-third of the estate, real and personal, and the remaining two-thirds be divided (in four parts) equally between his children, the grandchild taking it mother's portion. Her children by a former husband have no share in this distribution, except as the widow may give them her portion. The relationship between the first and second wife will not affect the division of the estate.

13. KY.—A daughter resident of Kentucky dies, leaving mother, sisters, and brother. By the laws of Kentucky, who are the heirs to

the property owned by the deceased, consisting of real and personal estate?

A. Under the laws of Kentucky, the mother is entitled to one-half of the property, both real and personal, and the other half goes to the brother and sisters in equal shares.

14. LA.—What are the Louisiana laws in regard to the estate left by a person who dies intestate? What steps should the heirs of such an estate take to get control of the same?

A. The children of an intestate, whether of the whole or half blood, inherit equally. Grandchildren divide the portion which would have come to their parents—that is, they take *per stirpes*. If there are no descendants, all immovables which came by gift from an ancestor, go back to the ascendants. If there are no descendants, but father and mother, brothers and sisters, the estate is divided into two equal portions, and half goes to the father and mother, and half to brothers and sisters.

The claimant of an interest in a Louisiana estate should ascertain who has been appointed administrator, and present the claim to him.

15. S. C.—Supposing a man dies, leaving his property (consisting of real estate and personal property) to be equally divided between two legatees, A and B: A is a citizen and resident, B is not a citizen and a non-resident of the United States; can B legally come into possession and dispose of the property willed to him? Will you please tell me if B can come into possession of the property in South Carolina?

A. If the testator acquired his real estate prior to 1807, his devise to an alien child or grandchild will be good according to the laws of South Carolina, provided the devisee shall become a resident of the State within 12 months, and a citizen as soon as he can under the laws. There is a provision also in favor of alien widows; under other circumstances B cannot take real property under South Carolina law, unless by virtue of some Federal treaty provision with the country of which he is a native. By our treaty with France B would have the right, if a citizen of that country, to take the devised property, and sell it to a citizen of the United States. A clause in our treaty with Italy gives the same right. As to personal estate, B can take without limitation. If our correspondent wishes to go to the original source

of information, he will need to provide himself with the South Carolina Statutes and our treaties with foreign countries.

HOMESTEAD.

1. What steps are to be taken in order to entitle a citizen of the United States to become possessor of 160 acres of government land. What is the first expense, has he any certain time to spend on it, and has he any expense to meet after having lived on the ground for such time, whatever it may be? Also, what special conditions apply to discharged soldiers?

A. The first step is to select the land to be entered, and the next to make affidavit before the Register or Receiver of the Land Office in which the entry is to be made, setting forth that the applicant is the head of a family, or is twenty-one or more years of age, or has performed service in the army or navy of the United States, that the application is made for his exclusive use and benefit, and that it is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person. On filing this affidavit the fee is \$5 if the entry is of not more than 80 acres, and \$10 if more. But a patent for the land cannot be obtained until five years from the date of the entry, when he must prove by two witnesses that he has resided on the land or cultivated it during that period; that no part of the land has been alienated, &c. The law does not appear to exact any fee for the issue of the patent. An honorably discharged soldier or sailor has six months after locating his homestead and filing a declaratory statement within which to commence his settlement and improvement, and he may perfect title in one year, provided he served four years in the army or navy, or was enlisted for that length of time and discharged on account of wounds received or disability incurred in the line of duty. In other words, the term of his service may be deducted from the five years' residence or cultivation required of other persons. A registry fee of \$1 for each declaratory statement filed; a commission to be paid by the homestead applicant, at the time of entry, of one per cent. on the cash price as fixed by law of the land applied for, and a like commission when the claim is finally established, and the

certificate issued therefor as the basis of a patent. There is also, it appears, an additional fee of \$5 for this final certificate.

2. How and where may land be obtained under the "Homestead and Timber Growing" acts in the West? What requirements are necessary to obtain land in this way? What charges, if any, are you obliged to pay on the land?

A. The applicant may enter any unappropriated quarter section of land for this purpose, make his affidavit and pay ten dollars to the Register and Receiver. After ten years he must prove by two credible witnesses that he has planted and for not less than ten years has cultivated forty acres of the same in timber, the trees being not more than twelve feet apart. He can then obtain his patent.

3. 1. Cannot two or more families settle under the "homestead law" on one-quarter section (160 acres) as a community, the land being entered in the name of one of the families in question, and this family at the expiration of the five years (when the land would belong to it) dividing it, the pre-emptor giving to each of the other families a deed for a proportion of the land at a nominal compensation, he having already derived benefit by being enabled to settle on the land through the co-operation of the other families?

2. Can two witnesses under these circumstances swear that the party has lived five years on the land, and that it is not "alienated"?

A. The pre-emptor can take as many people as he chooses with him upon the land, and he has not alienated it as long as he holds the title. He may, when the patent is issued to him and the five years have expired, divide it among those to whom he has promised it. This arrangement will in no way interfere with the privilege.

4. V A.—Will you kindly inform us whether the \$2,000 exemption from seizure under the Homestead act of Virginia covers stock of goods in trader's hands, or relates to household goods exclusively?

A. The exemption extends to property generally, but does not protect goods or property against levy for the purchase money of that particular property.

HUSBAND AND WIFE.

(SEE ALSO MARRIED WOMEN.)

1. I married a widow with four children, she having a house and lot of her own. I had a foundation of brick put under it to make the house good, but she still holds the house in her first husband's name.

She says to me now that I have no claim to the house or property because it is in her first husband's name, and that she can do what she likes with it.

She has four children by her first husband ; the eldest is a son unmarried and is about 20 years old ; the next is a daughter who is married, and the other two are from six to nine years old.

Will you let me know what claim I have on the property ?

A. "If the husband expended money upon lands of his wife in his occupation, by erecting buildings or making improvements thereon, the law will presume he intended it for her benefit, and he cannot recover for the same." (Washburne on Real Estate, vol. I, 335.) If the property should be claimed by the children, after her decease, we are disposed to think that a claim might be set up, in equity, to recover the value of the improvements, as against them.

2. A makes transfer of his real and personal property to B without consideration. B without consideration immediately transfers the same property to A's wife. Is such transfer good as to the creditors of A, and if not what remedy have they ? A claims that he is indebted to his wife and adopts this mode of paying her. If he can prove this would it make the transfer valid ?

A. Transactions of this sort are suspicious on their face, but if there was a bona fide debt owed by A to his wife he had the same right to pay her as any other creditor and need not have taken the roundabout way adopted. The validity of the transfer depends upon the original consideration between A and his wife. If A's creditors believe there was none and are willing to stake the costs of a suit upon this belief, their remedy is to bring an action to set the conveyance aside, and subject the property to their claims.

3. A man wishes to make his wife a present of all his household goods, furniture, paintings, silverware, etc. What is the simplest to do it to make the gift a legal one ?

A. There is no difficulty in conveying a title to the wife as against any but the creditors of the giver. To secure it against the latter, we think a deed of trust or deed of settlement upon the wife, must be legally executed. This can be readily done if the giver is at the time solvent beyond any reasonable question.

4. Can a husband be held responsible for debts incurred by a firm in which his wife has an interest, if said firm should fail?

A. The statute of New York allows the wife to carry on business in her own name and declares that no bargain or contract entered into by a married woman in pursuance of this right, "shall be binding upon her husband or render him or his property in any way liable therefor."

5. Is the husband legally responsible for the debts of his wife, which were incurred by her before their marriage?

A. By the law of this State a suit may be brought against the husband and wife jointly for any debt of the wife contracted before marriage, but neither he nor his property (except such as he may have acquired from her through such marriage) can be held liable either for the debt or the costs of suit.

6. Is a mortgage or a deed made by a husband to his wife as valid as if made to a third party, provided she has paid him its value?

A. If a wife has a separate estate from which the purchase money is paid, the husband's deed or other conveyance to her is good in this State against all the world beside. If her separate estate, however, originally came from the husband himself, it seems that creditors might question the conveyance. (*Savage v. O'Neil*, 44 N. Y., 298.)

7. Can a man's life insurance policy drawn in favor of his wife be attached for debt of the husband before or after his death?

A. In this State, unless the annual payment to maintain the insurance amounts to more than \$500, and is made out of the husband's property, the policy is not liable for any claims against the husband or his estate. In case the premium exceeds \$500 per annum only the excess can be claimed by the creditors.

8. I bought a house owned by a married woman. I would like to ask you is it sufficient if she signs the deed, or is it law and necessary that the husband must also sign it?

Is the law the same in such a case as if a married man sells property, that he must have his wife to sign the deed also before he can give a good title?

A. If possessed of real property as separate estate, a married woman may convey or contract in reference to it the same as unmarried, and her covenants for title, if broken, bind her separate estate. (Laws of 1860, chap. 90, sec. 3, as amended by chap. 172, laws of 1862.) The husband's signature to the deed is in this State, therefore, unnecessary, our progressive New York State laws having in this respect given married women the advantage of married men. To avoid all dispute as to the absolute title to the separate estate, however, it is quite as well for the husband to join in the conveyance if he does not object.

9. A husband has his wife sign note in blank payable to himself, and fills it up afterward, writing on face of said note "I hereby charge my separate estate for the payment of this note," the wife not knowing the amount or anything further in regard to its being a charge on her separate estate. Is the wife holden for said note, or is it valueless to holder?

A. In the hands of a holder for value, the note would be good against the wife's separate estate. When she signed she must have intended her signature to have this effect; and one who signs a note in blank is just as responsible for it to an innocent holder as if the writing preceded the signature.

10. A and B own a piece of property against which C (B's wife) holds a mortgage for \$10,000, and D an additional one of \$1,500 against A's share. A being unable to make payment of the latter, B buys his share of the property for \$9,000, by agreeing to assume his mortgages, and to give him a bond and mortgage in return for the balance, \$2,500. A being administrator, must apply for an order to sell, and to save time and expense B's attorney forecloses (per agreement) the \$1,500 mortgage and buys in A's share for B for \$6,500. B receives his deed, and gives A his mortgage for \$2,500 as above mentioned, claiming that it is not necessary for his wife to sign, it being a purchase-money mortgage. Is he justified in doing so? Can this be called a purchase-money mortgage? Can a married man convey away any part of his property without the knowledge and consent of his wife? Would it make the mortgage any safer if she signed?

A. The mortgage would be more acceptable if signed by B's wife, because that would prevent any dispute from arising on the question. It appears to be a purchase money mortgage, but in

order to come within the provisions of the statute, it must have been executed at the same time with the deed. With the exception of a mortgage for purchase-money, or the conveyance of an estate the title of which rests only for an instant and for a specific purpose in the grantor, we do not recall any other case where a conveyance by a married man, in his own right, will bar his wife of her right of dower, without her consent.

11. A sold B a lot in one of the cities of Florida for \$2,000 and gave warranty deed. He received \$500 cash, and mortgage on the property for balance. B's wife did not join in the mortgage, nor was she made a party thereto. Has she any dower rights in the property until such mortgage is paid? Or, does said mortgage cover the whole property without her being made a party, it being given for "purchase-money," though not so stated in the mortgage?

A. The rule prevalent in many of the States that the vendor's lien for purchase money upon the land sold and mortgaged is superior to any rights which may be acquired by any of the heirs or privies of the purchaser, and so superior to the wife's right of dower, was adopted by the Supreme Court of Florida, in the case of *Bradford v. Marvin*, 2 Fla., 463, and that decision appears to be still the law. That being the case, the wife obtains no dower until the purchase-money mortgage is first satisfied.

12. A loans B \$1,400 on a first mortgage. B's wife also signs the mortgage but not the bond. B dies intestate, leaving a son. The interest not being paid when due A institutes foreclosure proceedings, and the property will be sold. Can A, if the sale should not realize the amount of the mortgage, lay claim to a store which the widow has commenced?

A. If the store is paid for out of the property belonging to the estate, it is subject to the claim of the mortgagee on the unsatisfied bond.

13. If a married woman indorses her husband's note, can we not hold her for the amount if he fails to pay? If no, then would she be holden if she signed a note jointly with him?

A. In this State a married woman may bind her separate estate, either as a maker or indorser, if with her signature she states this.

14. CONN.—Can, in the State of Connecticut, a wife legally execute

a bill of sale on her own individual property (personal or real) without knowledge or consent of her husband?

A. Where the marriage has taken place since April 20, 1877, a married woman in Connecticut may convey her real or personal property without her husband's consent the same as if she were unmarried. If the marriage took place before that date the husband must join in the wife's deed.

15. MASS.—Can a married woman always residing in Massachusetts dispose of her real estate without her husband signing the deed with her?

A. In Massachusetts a married woman can deal with and convey her separate property, real or personal, the same as if she were single.

16. N. J.—We are doing business with a house in New Jersey. At the present time the said house is going through bankruptcy, and business is now conducted in the name of the wife, under the style of "L. & Co." L. wants to increase his line of credit, and proposes to secure us by giving a five thousand dollar judgment note of his wife on free and clear Pennsylvania lands. L. says he would not be able to sign a mortgage with Mrs. L. until he gets his old matters settled. Supposing the land to be of value, would this form be of sufficient security?

A. Neither the laws of New Jersey, where this married woman resides, nor the laws of Pennsylvania, where the land is situated, allow her to create a lien on real estate without the signature of her husband.

17. N. J.—Can a wife devise real estate by will in the state of New Jersey, and if not, who would inherit said real estate on her decease, provided her husband survived her, no children having been born to them?

A. Married women in New Jersey may devise their separate estate the same as if they were single, except that they cannot cut off the husband's right as tenant by courtesy where that exists. In the above case the husband has no interest whatever in the wife's real estate, and in default of a disposition by will it would descend to her heirs at law, who are, there being no children, her brothers and sisters, father and mother, etc., in the order named.

18. VA.—A, who is a trustee for an unmarried woman, loans money to B, a trustee for the woman, and takes a deed of trust on real estate;

before the return of the money by B the unmarried woman gets married. Would it be necessary for her husband to join with the trustee and the woman in the release deed?

A. By an act of the Virginia legislature passed in 1877, it is made necessary for the husband to join with the wife in any contract in reference to her real or personal property. Both should therefore execute the release with the trustee.

INFANTS.

1. Will you please inform me at what age a young lady attains her majority, and oblige.

A. Except where the common law rule has been changed by statute, the age of majority for both males and females is 21. The New York statutes validate certain acts done by persons under that age, but the general rule is unchanged. An unmarried female of sound mind may make a will at 16, and a male at 18, in this state (N. Y.).

2. Is a minor, doing business in his own name, responsible for damage done through the negligence of his employees, and if not can he be held responsible after he becomes of age for damage so done during his minority?

A. If a minor is in business and represents himself to be of age when he is not, he will do well not to put in the plea of minority to escape the legal consequences of his assumed position. "Infancy," as the condition of a minor is legally termed, is no defense to an action not dependent upon contract. A minor must answer for damages consequent upon his acts, the same as if he were of age.

3. Can a minor be legally given the power of attorney to sign and endorse checks and bills of lading?

A. If the principal is of age, the attorney, being duly authorized, can bind him by his signature precisely as if he was not himself an infant.

4. If a note is signed by a minor, to be paid when he is of age, can it be collected of him or his father? The minor has received no value whatever and has been led to sign the note under false representations.

A. Payment of a note given under such circumstances can-

not be legally enforced of either the minor or of his father at any time. As an acknowledgment of debt it is worthless.

5. Please inform me at what age the liability of parents ceases as regards debts contracted by their children. Does the sex make any difference as regards the time?

A. Parents are liable for necessities furnished their children during their minority, but not even at this age for every debt a child may choose to incur. At the age of 21 this liability ceases for either son or daughter.

6. Is it necessary for a minor to have a passport in traveling? If so, can I obtain one, my father not being an American citizen?

Is it necessary for me to take out "first papers," that is, two years before I can become an American citizen, or can I at once become naturalized at 21 years of age, having resided here 12 years?

After becoming an American citizen at majority, can the authorities of Germany hold me for military duty if I visit that country for a stay of less than two years, my father having emigrated when I was 8 years of age, but he has never been naturalized here?

A. A passport is not necessary, and could not be obtained.

When you reach the age of 21 you can declare your intention and take out full naturalization papers on the same day.

The United States will protect its citizens. If after becoming an American citizen as aforesaid, you return to Germany and stay there two full years, the government there has the right under treaty with us to assume that you have renounced American protection, but within that date you are safe under your American citizenship.

INSOLVENCY.

(SEE ALSO ASSIGNMENTS.)

1. Does the acceptance of a dividend from a bankrupt estate in this state (N. Y.) discharge the debt?

A. The acceptance of a dividend does not necessarily discharge the debt.

2. A gets a note from B, indorsed by said B, drawn to B's order by C. B fails in business and pays his creditors 30 per cent.; before payment of said 30 per cent. the note comes due and C lets note go to protest; the note, uncollectible now, may be worth something, possibly its face, in two or three years. Is A entitled to 30 per cent. on the amount of note, he retaining said note? Or must he give up the

note to B on payment of the 30 per cent.? Or can A be compelled to have the note valued by court and then receive 30 per cent. only on balance between valuation and face of said note?

A. A can bring suit against both B and C, or if B goes into bankruptcy, can prove his whole claim against him, take the 30 per cent. dividend, and recover the balance of C. But if he compromises his whole claim on the note for 30 per cent., he cannot retain any account against the other parties.

3. A owes C as per his note due in New York next May, upon which note A's son B is indorser. Some second mortgages and worthless stocks are also given as security for the note. In September, 1878, B, the indorser, went into voluntary bankruptcy, listing this endorsement among his liabilities and giving in no assets. A has considerable insurance on his life for the benefit of B and other heirs, which policies are now quite valuable and on which no annual premiums are due. Can B's interest in these policies be made liable for his debts, or can the fact that he does not give them in as assets be used to prevent his discharge in bankruptcy? If B had not listed this endorsement among his liabilities and should resist their proof against his estate, could it be held as a debt against him? B's father is known to be insolvent.

A. The mere fact that B omitted his interest in the life insurance policy from his schedule is not sufficient to prevent his discharge, but the omission must be shown to be willful (in re Eidom, 3 B. R., 106; in re Connell, 3 B. R., 443; in re Smith, 13 B. R., 256). An omission of property by accident or mistake will not prevent a discharge. (Loud v. Pierce, 25 Me., 283; Suydam v. Walker, 16 Ohio, 122.) But whenever an asset is thus omitted, the creditor may oppose the discharge, specifying the omitted item, and on trial of the issue it seems clear to us, though we can cite no authority on this point, that the bankrupt's continued neglect to amend his schedule so as to include the policy would go far to prove the willful character of the omission and thus establish the statutory bar to a discharge. (Sec. 5110, subdivision second, national bankrupt act.) A discharge being withheld, the interest of B in the policy could be reached by his creditors, it having been held that the beneficiary has a vested interest before the death of the person insured. If the indorsement had not been scheduled as a contingent liability it would still subsist as an obligation in spite of a general discharge, because the certificate is a bar only to debts which were

or might have been proved, but not against personal engagements which were not provable. (*Murray v. De Rottenham*, 6 Johns. Ct., 52;) and a claim against a bankrupt as indorser cannot be proved before the liability becomes fixed. (*In re Lodon*, 4 B. R., 190.) In the above case the liability does not become fixed until next May. If the final dividend has not been declared however, at the maturity of the note, and default, the debt might be proved, (Sec. 5069,) and in that case it would be barred, whether it was in fact proved or not. (*Hardy v. Carter & Humph.*, 153; *Rogers v. West Ins. Co.*, 1 La. An., 161.)

4. We buy wheat for parties in an interior town, upon their orders, drawing upon them at thirty days, from time to time, for the cost thereof with our commission added. They fail, leaving \$1,400 of these notes unpaid. Must we come in as common creditors under the law, or do the above facts give us any preference?

A. The debt is not a preferred or privileged obligation.

5. Can a merchant in Rhode Island, sell his stock of goods to another person and let the goods remain in same store, and then carry on the business as agent and avoid paying his creditors? Will it alter the case if the person to whom he sells is or claims to be a creditor?

A. His creditors can throw him into bankruptcy and recover the property for the benefit of his estate, provided, as appears, the sale was made in view of insolvency.

6. An American merchant having a branch house in France, which is conducted by his partner (also an American), fails and takes the bankruptcy act; is the house also released through this act of his debts in Europe?

A. The practice differs a little in foreign countries, but as a rule a discharge in bankruptcy here will not be recognized in foreign courts as applicable to debts contracted there. This applies as well to houses that have no foreign partner, as to one that has. An American merchant who bought goods in Paris, for which he has not paid, and afterward obtained in this country a discharge from his debts, might be prosecuted if he afterward visited France, and his discharge here would not be accepted in bar of the claim by the French courts.

7. A and C sold B goods in 1876, 1877, and 1878. B held a contract for the farm he was on. In the fall of 1877 C takes an assignment of the

contract and pays the amount due on the farm, being \$500, and takes a deed in his own name, the farm being worth at the time \$1,000 and will bring to-day \$1,000. Now has B an equitable share in the property, and can A and C have said deed set aside by paying C the amount he paid on the property, interest included? C had no claim against B in any shape. This transaction was done in order to keep the property out of the hands of B's creditors. A and C have proof to show this. How should A and C proceed? A receiver has been appointed in B's property.

A. If in saying that C had no claim against B in any shape, our correspondent means to affirm that B received no consideration for his assignment of the contract to C, and the proof in other respects corresponds with the statement, we think the transfer can be set aside in favor of the creditors. This can only be done by means of a suit, which the receiver is entitled to bring.

8. The firm of A & W made an assignment both as co-partners and individually. The assets of A proved to be sufficient in amount to pay the principal and interest in full of the debts proved and allowed against the individual estate. Must the interest on the same be allowed before the excess is turned over to the estate of the firm, the assets of which fall short of meeting its liabilities?

A. This has been legally decided: "If the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the assignment, the surplus of such separate estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts before paying interest on the separate debts after that time." In re Berrian et al., 44 How. Pr., 216; S. C., 6 Ben., 297.

9. Will you inform me what is the intention of the bankrupt law of this State in allowing a bankrupt to prefer certain creditors to the detriment of others? I have not been able to get this information from any person I have asked about it. The intention of every law is a good one, but here I cannot perceive it. It appears to me to be the means in the hands of a bankrupt to defraud his creditors.

A. The right of preferring a particular creditor does not belong especially to the law of New York, but existed at common law. An English judge, in endeavoring to account for its existence, said: "The right has been allowed, perhaps, on the principle of humanity; or in favor of just debts, to exclude debts in law not strictly *ex debito justitiæ*." The judge never-

theless disapproved the principle, and it is now in pretty general disfavor, having been abolished in England and in many of our States.

10. If a party who has filed his assignment should become heir to property by the death of a relative while proceedings are pending, would said property go to the hands of his assignee for distribution to his creditors? If said assignee should fail to get his discharge, would said property be liable for the old debts?

A. The earnings and acquisitions of the insolvent subsequent to the commencement of the proceedings are his own, subject to the eventual discharge of the assignee. If he does not succeed in obtaining such discharge, they remain liable to execution or attachment by the former creditors, precisely like the property he previously held, *Meays v. Man. National Bank*, 4 B. R., 446; S. C., 4 B. R., 660; S. C., 64 Penn., 74.

11. I loaned a friend my check for \$100 about three months ago, and he promised to return it in a few days. He handed me a small box containing some jewelry which he said I could hold as security. The value of the jewelry is about \$40 or \$50. Can I do anything with the jewelry, or am I bound to keep it? I do not see any prospects of getting my money.

A. The safest way is to bring suit and recover judgment and then to sell the pledged jewelry under execution. The creditor can buy it in if he likes at the auction sale, and hold the debtor for the remainder that is due.

12. A buys \$500 worth of merchandise from B, and in payment gives him (B) a four months' note, which B indorses and discounts in bank. B afterward buys \$1,200 worth of merchandise from A on open account, thirty days' time, and before this elapses and A's note matures, A fails and makes an assignment. Will the \$1,200 that B owes to A on open account be an offset to B's note?

A. If B distinctly bound himself to accept the note as "payment," and action on A's claim was begun before the note matured, there may be a question whether the two demands could be set off against each other. On the presumption, however, that there was no distinct agreement to accept the note as "payment" B has a right to proceed against A for the original debt in case of the dishonor of the note, and in that case the debt constitutes a good counter-claim against the demand of A.

13. Does the payment of a dividend by a State assignee operate as a renewal of an obligation under the statute of limitations?

A. It does not. *Pickett v. Leonard*, 34 N. Y., 175; *Stuart v. Foster*, 18 Abb. Pr., 305.

14. I am preferred creditor of A (deceased) by his will. After the death of A it was found that he was insolvent and a receiver was appointed, but nothing further has been done. I have discovered some real estate which is still on record in the name of A in another county. Can I sue and get a judgment (the claim not being disputed) and sell the real estate, or must I compel the receiver to dispose of the real estate and apply the proceeds to the payment of the preferred creditors?

A. If by "receiver" is meant an assignee in bankruptcy, the preferred creditor cannot collect his debt out of the real estate in question, because it is an asset to which the assignee is entitled. And if it is correctly said that a "receiver" has been appointed, we do not see that he is any better off. If an administrator is meant, and the creditor is entitled by lapse of time to bring an action, superior diligence in getting judgment and issuing execution against the property would no doubt be rewarded.

15. A, B & Co. are in business as partners, C being the company and capitalist. A, B & Co. issue notes to be and which are discounted and held by different banks; all of which are endorsed by C. C died, about a year ago, with no will, and his death compelled the remaining partners to make an assignment under the State Laws (New York) and afterward to go into voluntary bankruptcy. They, A and B, now seek to have their creditors sign for their discharge, but the banks hold that by so doing they release the indorser, which in this case is C, who is also one of the makers. The question is, can the banks sign for the discharge of A and B, and still collect of the estate of C, as one of the makers of said paper, even if it does release him of being an indorser?

A. A statute of this State, (N. Y.,) expressly authorizes creditors to compromise with one or more members of a partnership, without releasing the other members, and the provisions of the same act are extended to joint debtors in general. (Chap. 257, Laws of 1838.) There have been, moreover, various decisions elsewhere, which are cited by Daniel in his work on Negotiable Instruments, as establishing the rule that "a release of one of two joint debtors will not discharge the others if the holder's

rights against them are expressly reserved." (Daniel, sec. 1295.) We are, therefore, clearly of the opinion that the banks may, by a properly worded release, discharge A and B without detriment to their claim against the estate of C. The same object may be accomplished by a covenant not to sue A and B.

16. Can a member of a bankrupt firm obtain an individual legal release from the creditors of the firm? If so, does the release cover the remaining members of the firm when it expressly states to the contrary?

A. Such a release has been held good to effect the object intended, and no more; but a more certain way is to give the person intended not to be released a covenant not to sue him for his debt. This the law construes the same as a release to the covenantee, but not to his joint debtors.

17. A & Co. suspend payment and offer 25 per cent., which the creditors refuse, asking 50 per cent.; nothing definite being arrived at in the way of settlement, A & Co. continue business under the name of B & Co., using the assets of A & Co., and after a short while again fail. What rights have the creditors of A & Co. in preference to those of B & Co.? Is not their claim on the assets of A & Co. intact?

How long after the failure of a concern is a partner liable for the debts in the event of no compromise?

A. If the parties in both are exactly the same there would be no preference given to either creditors. But if otherwise, the creditors of B & C would have the preference, if given to either. The limit of liability is the usual statute of limitations.

18. We got into difficulty and made a settlement with our creditors under a deed of composition and discharge, which was confirmed by the Judge of the Insolvent Court here. One creditor only refused to accept the composition—a New York house. Can they in the event of our going to the United States, take proceedings against us and recover the amount of their account? Is our discharge from the Insolvent Court here binding on them?

A. If the debt was contracted here a discharge under a compromise or any other form of bankruptcy proceedings in Canada will not prevent a successful suit by the creditor if the debtor comes into this jurisdiction. If the debt was contracted in Canada and due to a party here, it is not so free from doubt. In England and France a foreign discharge in bankruptcy would be

a bar to such a case. Judge Betts, United States District Court Southern District of New York, in the case of Augustus Zarega (1 Legal Obs., 40, note), said that a foreign discharge in bankruptcy does not bar a debt contracted here, or due to a citizen of this country, but this was only a dictum, and the common impression has been that if the debt was contracted abroad, a discharge there would be a bar to its recovery anywhere.

19. Three years ago I, J. T. A., owed A & Co. a sum of money, and to secure them I had a policy of insurance taken out which I assigned to them for security. One year afterward A & Co. failed in business and assigned the policy to J. S. and T. M. Shortly afterward I was unable to pay the premium upon the policy and it was returned to the company, and a paid-up policy was issued in its place; the policy was written in my name, but in the body of the policy is the following: "For the benefit of J. S. and T. M., trustees for the creditors of A & Co., as collateral security for the amount of the demands of A & Co., subsisting against said J. T. A.; surplus, if any, for the benefit of said J. T. A.'s wife, if she shall survive him." I have also failed, and gone through bankruptcy and been discharged. The trustees, S. and M., still hold the policy of insurance for the demands of A & Co. against me. As I have been discharged by the court of all my indebtedness, what will become of the policy held by the trustees—will it come back to my estate at my death, or will it go for the benefit of A & Co.'s creditors through the trustees? It seems to me from the manner in which the policy is written that A & Co., who have assigned all their claim in the policy, and who are now dissolved and out of business, can have no claim, as they have no existence as a firm of A & Co. or otherwise. Nor can the trustees have any demands after I have been discharged, such discharge canceling such indebtedness; the collateral is only a contingent security depending upon my payment, or to be collected after my death. When the trustees present the policy to the insurance company for payment, would not the company require them to show my indebtedness to A & Co. before they would pay the policy? And as there would be no indebtedness existing at that time, would they pay the amount to the trustees, or what would become of it? I am fully aware that a discharge in bankruptcy does not affect a party who holds collaterals such as stocks and bonds, etc., or prevent him from selling or realizing on them at any time to secure his claim, but the above case seems to be a contingent one and of a somewhat different character.

A. The contingency in the above case affects the value of the policy, but not its title. It appears to us that the ownership became absolute in A & Co. at all events, upon the adjudication in bankruptcy. Could the assignee of J. T. A. have laid claim to

the policy as an asset of his estate? We think not. And if not, it was because no title to it remained in J. T. A., except to the possible surplus after the payment of A & Co.'s debt. The dissolution of this firm would not affect the title of their assignee before dissolution. A & Co.'s debt was not discharged, because it was already paid, so far as the policy would pay it, before the discharge took effect. The policy must be looked upon as the undertaking of a third party to pay the debt if the principal did not, and it makes no difference that the time of payment was made to depend upon a future event.

20. A is employed at a weekly salary by a firm that is embarrassed. They wish him to make a trip for them, selling goods on salary, they paying his expenses. He may be gone several months, when there will be due him about \$300. In case the firm fails before his return can he collect the amount due him in full, or must he come in with the other creditors? Is there any limit to the amount a workman is allowed in full for services where employers fail, in case the money has not been put in the business?

A. There is no provision in the State insolvent laws, so far as we know, for the payment by preference of clerk's or laborer's hire.

21. Under what circumstances can creditors set aside assignments made by debtors, and appoint an assignee of their own selection?

A. Since the repeal of the bankrupt law, only in case of manifest fraud can an assignment be set aside in this State.

INSURANCE.

FIRE.

1. A instructs B, an insurance broker, to insure a given sum. If the insurance company issues a policy under this order without collecting the premium, giving credit to the broker, does the policy hold the company in case of loss?

A. It has been legally decided that if the broker refuses to pay, the company may sue the insured for the premium and collect it of him, although he has already paid it to the broker. Or the company, if such payment is delayed or refused, may give the insured notice and cancel the policy. But until this is done the

policy will hold good, and in case of loss the company is as much bound as if the premium had been paid.

2. In case of fire where a party holds the policy or renewal receipt of a company, but has not yet paid the company, in that case does the insurance hold good?

A. A fire insurance company that has issued a policy or a renewal receipt without having actually received the premium, is held liable in case of loss, on the ground that it has granted a voluntary credit to the insured. But the company has the right at any time to demand payment, and if this is refused, to cancel the policy or renewal, and after notice to that effect, is no longer bound by it.

3. A buys a house and lot for \$4,000, but borrows half of the purchase money from B, for which he gave B an ordinary promissory note, with a fire insurance policy for \$2,000, the amount of the policy. At the expiration of the \$2,000 policy, or two months after its expiration, B, the note holder, sends to the insurance agents the amount of premium required to renew a collateral insurance for one-half the amount of the note he holds, that is, for \$1,000. Both the policies read precisely alike, both giving owner's (deed holder's) name, and both having written on the face by the insurance agent, "Loss, if any, under this policy payable to B as collateral security." Now if B has renewed this insurance, with the amount reduced as stated, and has paid for his own protection and security, without having notified the owner, is the policy valid?

A. So far as appears from the above statement of the case, B has no interest, legal or equitable, in the house and lot in question, and therefore not an insurable interest. He can only take the insurance money by direct assignment from A. We are accordingly of opinion that a policy obtained under the circumstances stated would not bind the company to pay it, if they chose to contest it; and we do not see that notice to A would mend the matter, unless he not merely assigned the policy as described, but covenanted to keep it alive.

4. I have my insurance placed through a broker, to whom I pay the premiums but who receives his brokerage from the insurance companies, and he brings me policies duly signed by the proper officers of the companies. Can they compel me to pay it again? and in case of a fire can they refuse to pay the insurance? I ask the question because I am told they can so refuse, while it appears to me, that as they

have their protection in their own hands by refusing to give up the policy until paid for, that if they do so they assume the risk of the broker paying them and not the insured.

A. The policy provides that the broker shall not in any case be considered as the agent of the company, and the courts have recognized this as a valid part of the contract. The company by delivering the policy without paying, makes itself liable for the time, as it thus virtually gives a credit to the policy-holders. It may at its option then demand payment and collect the premium, although the insured has already paid the broker; or, if payment is refused, it may cancel the policy on notice to that effect. But until such demand and notice of cancellation the policy will hold, although the premium has not been paid.

5. A has been insured against loss by fire in a certain insurance company. Before the expiration of his policy he applies to another insurance company, in which he takes out a policy. A does not understand English. On the evening before the expiration of the first-named policy, the agent of the first insurance company calls with receipt for renewal. A produces the policy of the second company and asks if it is in payment for that one. Agent replies "yes," takes the money and a few hours after sends him a policy. Next day A finds out he has been misled by the agent, calls on the first company and demands the return of the premium, insisting that he has been the victim of sharp practice at least, and returned the policy. After much talk and inducements of a reduction not accepted by A, the first company returns the premium, less commission and one month's premium, short rate.

A. If the "Agent" here mentioned is an insurance broker, the insured has no redress, since the underwriters in all their contracts expressly stipulate that all such persons shall be considered the agent of the policy-holder, and not of the company. But if he is a clerk in the service of the underwriter, the man who paid the money may sue for and recover it, as he paid it under a mistake, to which the said receiver contributed.

6. 1. A owns a house and insures it in his own name. He subsequently deeds it to B, who immediately transfers the title to the wife of A for \$1 consideration. Both deeds are placed in the custody of C to hold for a contingency *in escrow*, no notice being given to the insurance company. In case of loss, is the insurance company liable, and why, or why not?

2. In case the above premises are mortgaged, how is the interest of mortgage secured?

A. 1. If the deed was not delivered, the title is still in the original owner, and the insurance in his name will hold.

2. If the policies were assigned with the loss payable to the mortgagee, and the consent to such assignment by the underwriter is indorsed thereon, the policies will hold to the extent of the latter's interest, even if the owner had transferred the rest of his title and interest, since the transfer is subject to the mortgage.

7. To what extent are insurance companies responsible under their policies as now issued in this city (N. Y.), supposing a loss of \$75,000 occurs on a stock of \$150,000 which was only insured for \$75,000? By answering this in your columns you will oblige a subscriber.

A. There are two forms of policy, one containing a clause which limits the liability of the underwriter to the proportion of any loss, which the insurance bears to the whole value of the property. With this clause in the policy the insured above would only obtain \$37,500 on his loss of \$75,000. But in a proper policy drawn without this clause, the insured would recover the full amount of his loss. Most of the ordinary policies are drawn to meet the latter interpretation.

8. Is a shipper who had insured his goods under floating fire policy "covering all risks not specifically insured or covered by marine insurance," guilty of negligence?

Does the fact of taking for *all* the goods, a bill of lading, "shipped by A B to be laden on board the steamship C," or any other steamship, of that line, terminate the floating insurance, not only as to that part of the goods upon which by terms of the policy marine insurance had attached, but also as to that part remaining upon the wharf?

A. If the floating policy did apply to and covered the goods to which the marine policy did not apply, then the shipper was not guilty of negligence.

9. Would an iron safe be included as household furniture in settling an insurance loss, covered by policy specifying "household and kitchen furniture, useful and ornamental?" Also whether a house is untenanted or unoccupied in such a sense as to affect insurance claim, when it is left for a day or two in charge of a servant living in a lodge adjoining?

A. If an iron safe, not part of the realty, is used as a piece of household furniture, in which to store the silver and other

valuables of the household, we can see no reason why it is not properly included in the description. The old policies generally provided that in case of fire the insured "shall deliver as particular an account of the loss and damage as the nature of the case will admit," and* this is all that can be exacted. Leaving the house for a day or two in charge of a servant living in an adjoining lodge, is not, in our opinion, to bring it into the list of houses "untenanted and unoccupied."

10. An ocean steamer, insured under fire policies only, takes fire in her lower hold while loading cotton at a southern port. To extinguish the fire and prevent a total loss, the steamer is flooded and sunk at her berth; is afterward raised, cargo discharged, cared for and sent to its destination in same steamer, and is sold to determine the loss on the same. An adjuster states the usual "general average" claim against the steamer, freight and cargo, which embraces such costs as the extinguishing of the fire, raising the vessel, unloading and reloading cargo, and damage thereto, etc. Please state the obligations of the fire policies to repay the steamer's owners for the contribution assessed against her in the "general average."

A. It is hardly proper for us to decide a question which is before the courts, perhaps in the very case to which our correspondent refers. We refer to the claim of the owners of the steamer *George Appold* against certain Baltimore fire insurance companies for a similar loss.* The fire underwriters, while willing to pay the loss by fire, and a reasonable proportion of the expenses of extinguishing it, have, as far as we know, declined to recognize their liability for general average, such as is acknowledged in marine insurance, and the case we have noted will probably be carried up to determine this question.

11. Some time ago the curtain in my parlor caught fire, completely destroying one chair, shade, cornice, etc., and burning a hole in the carpet about a yard square, and damaging the hall carpet by water about two yards. I am insured for \$1,500. Now what I should like to know is: Can the insurance company refuse to pay for the cornice because it is fastened to the wall? The house is insured by the landlord. The carpets being only partially damaged, am I not entitled to have them replaced? The underwriters claim that they are only compelled to replace what is actually burned, thereby making the carpets worth about one-half their previous value. I claim that I am entitled to have both carpets replaced in full, also to have cornice paid for. Am I right?

A. The cornice is part of the furniture insured, provided it

* Since decided in favor of the Insurance Company.

is attached in such a way as to be removed when the tenant leaves. The measure of the damage is not the new value, but the existing cash value of the articles ruined, or if damaged, the difference between their previous cash value and their present worth. The underwriter would not be expected, and is not liable, to furnish entire new carpets in the case described, but to pay the cash value of the damage.

12. Do fire insurance companies pay the full amount of the policies of insurance regardless of the proportion the amount of insurance bears to the whole stock of merchandise insured? For illustration, say I have a stock of merchandise worth \$100,000, and have insurance thereon of \$75,000. Suppose \$75,000 of my stock destroyed or damaged by fire; in that case do I get \$75,000 from the insurance companies, or only three-quarters of \$75,000, that being the proportion of insurance on the whole amount, viz.: \$75,000 on \$100,000?

A. In an ordinary fire insurance policy a person who insures \$75,000 on property worth \$100,000 will be paid the extent of his loss, up to the whole amount of his insurance. But there is a kind of policy containing a clause that provides for a payment of only such proportion of the loss as the amount of insurance bears to the total value of the property. Under such a policy, a person who insures \$50,000 on property worth \$100,000, would only receive \$25,000 in case of an actual loss of \$50,000.

13. A policy of fire insurance contains the following clause:

No insurance, whether original or continued, shall be considered as binding until the actual payment of the cash premium. But when a note is given for cash premium it shall be considered a payment, provided the payment is made when due. And it is hereby expressly stipulated and agreed, by and between the parties, that in case of loss or damage by fire to the property herein insured, and the note given for the cash premium, or any premium, or any part thereof, shall remain unpaid or past due at the time of such loss or damage, this policy shall be void and of no effect.

1. A note is given for premium at 90 days and the party fails to pay when due, the policy thereby becoming void. Can the company collect the whole note, the forfeiture of policy being caused by no action on their part?

2. If note is paid after maturity does this subsequent payment, in law, reinstate the policy?

3. A gives his note for premium payable at 90 days. Six months after maturity, A sells property insured to B, and transfers policy to him. The company, not recollecting the holding of A's note, consents to the transfer by indorsement. In case of fire is the company liable to B, when neither has paid one cent of premium to the company, and when a forfeiture of policy existed at the time of A's transfer?

4. If the company credit a note with two or three different payments, and a fire occurs, is the company liable if any part of the note is unpaid?

A. 1. There is here a partial failure of consideration for the premium note, and it is possible, by reckoning short rates of insurance, to apportion the amount of recovery to the executed part of the contract; yet as the maker of the note would have to plead his own default as the cause of the failure of consideration, it does not appear to us that the defense could be admitted, and we think the company could collect the entire note.

2. Payment of the note after maturity, and therefore after breach of the contract and forfeiture of the policy, could not be forced on the company so as to revive it, but if received without objection would probably be held a waiver of the breach and forfeiture, and reinstatement of the policy.

3. If the company's consent to the assignment of the policy could have misled a diligent purchaser as to its validity, it is likely they would be estopped to deny what their action had apparently affirmed; but if B could have ascertained by inquiry, as it seems to us he might, whether or no the policy was a valid one, it does not seem to us to be a fit cause of estoppel, and the company ought not to be bound.

4. By the contract as contained in the clause above cited, if the loss occurs after maturity of the note, and any part of it remains unpaid, the company is not liable. We suppose no question is raised as to its liability for loss before maturity, but if so, we are clearly of opinion that there is no room for such a question.

14. On a loss by fire of a property at Flatbush, L. I., the plaintiff is a mortgagor for \$10,000 on a hotel property so destroyed, of which the owner is a woman under age; the guardian, the mother, refuses to make proof of loss. The court hold that proof of loss must be made by the owner of record. As such owner refuses to make such proof, what is a mortgagor to do under such circumstances, or what recourse has he? What is our remedy? It seems to us that if this be law, capitalists will be chary about loaning on bond and mortgage.

A. It does not seem to us at all doubtful that a remedy exists, or at least did exist within the time limited by the insurance policy for proofs to be perfected. Application should have

been made to the Court having jurisdiction in the case for an order compelling the guardian to take the necessary proceedings. It may not yet be too late: as to that we could not venture an opinion without a more minute acquaintance with the circumstances. If too late, we think an action lies against the guardian for the damages resulting from her refusal to do her duty.

15. We are occupants of a large building with several tenants. We make application for insurance, and the companies make the survey and issue policies. Is our policy jeopardized by any acts of the other tenants, over which we have no control? For instance, one of them introduces and uses a small engine for cutting purposes.

A. If the premises insured "be occupied or used so as to increase the risk" the policy becomes void, unless the company has previously consented to this increase of the hazard. Our correspondent, therefore, will best protect his interest by notifying his insurers and obtaining from them the necessary indorsement on his policies.

16. We are tenants in a building of which we rent the first floor and basement; over the other parts of the house we have no control; hitherto the parties occupying these have used them for purposes classed hazardous and extra-hazardous by the board of underwriters.

1. How would it affect us in case of fire, if without our knowledge a change had taken place which altered the risk from hazardous and extra-hazardous to "special hazardous?"

2. How can we protect ourselves against such a contingency?

A. 1. Any increase of risk in the occupancy of the premises (either with or without the knowledge of the assured), not consented to by the insurance company, would render the policy void. The company agrees for a given consideration to cover so much risk and no more, and cannot in reason be expected to assume a greater hazard without additional premium.

2. It is proper that our correspondent should know, for his own protection, whether or not his neighbor is engaged in any trade or occupation of a class more hazardous than is permitted by the terms of the policy; if so, he should promptly notify the company insuring him that an increase of risk has occurred.

17. It has been advanced that the insurance on a lot of goods held by the seller, for account of the buyer, and insured under the clause of "goods sold but not delivered," is vitiated or imperilled by the de-

livery of a portion of the lot. Also, that goods held as stated above, which have been paid for, do not stand in the same relation as regards insurance as goods unpaid for.

Further, does the word "removed" in place of "delivered" in above clause, carry more protection to the insured? Your reply, with court decisions in confirmation will much oblige.

A. A delivery of part of the goods, with the remainder turned out or separated from the rest of the stock, has been held to be a technical delivery of the whole, for the purpose of settling the question of ownership; but if the seller has agreed to keep the property for any positive or given length of time, the policy covering "goods sold but not delivered" will apply to it in that interval beyond question. A report on the responsibility of insurance companies for goods sold and not delivered was made August 12th, 1868, and republished in pamphlet form by Clayton & Co., 160 Pearl St., in 1873. The committee of the underwriters in that report object to the use of the words "sold but not removed" as possibly covering the interest of many successive owners, and of attempting to apply the policy to a class of goods in which the holder had no insurable interest whatever. This would violate the rule established by the underwriters declining to admit any new interest without the written assent of the insurer.

In regard to goods "sold but not delivered" the report advises that where the parties insured have sold and delivered the goods in such a way that their responsibility for their preservation has ceased, they have no insurable interest, and ought not to be protected. The report suggests that in all contracts for sale where the sellers intend to apply their policy to the protection of the goods, there shall be a stipulation on the part of the seller limiting the time or option as to delivery to a given period.

In our judgment, however, the policy of the seller applicable to goods sold but not delivered, will be held by the court to cover all stock in store which he is holding in good faith, either for the convenience of the customer who has purchased them, or for the sake of lessening his risk and avoiding too large a delivery on outstanding account. He may deliver part, and hold the balance till both parties are ready to close the arrangement, and have the same subject to his insurance.

To avoid all legal question, however, it is well enough to have a stated term of time in the contract of sale, during which the delivery shall be obligatory or optional.

18. Our insurance policies contain the following clause: "On merchandise, hazardous or not hazardous, their own, or held by them in trust or on commission, or sold but not delivered." Are not the insurance companies legally liable under this clause, on merchandise which we have sold to parties, but have agreed to hold for them in our store, subject to their order for delivery?

A. Unless there is some other stipulation in the contract excluding such merchandise, the policy does most certainly apply to it.

19. If a speculator buys a quantity of merchandise from a manufacturer, the custom of the trade being to deliver "free on board," and the speculator not wishing immediate delivery requests the manufacturer to hold the goods subject to order, in the mean time making cash payment for them and getting a receipted bill, will a general insurance policy covering the manufacturer's stock apply to these goods awaiting delivery? Will the clause, "Goods held subject to order, covered by mill insurance," written across the bill rendered have any force or value in case of loss or damage by fire, it being the custom of the manufacturer to carry a maximum amount of insurance at yearly rates, and terms to cover all his stock in store? The question of course, is mainly one of title, the goods often remaining uncalled for a number of months or even years.

A. After making the assumption that the terms of the policy are such as to cover only the property of the mill owner, and that if title has completely passed to the buyer they are not covered by the policy, the first remaining question is dependent upon circumstances not detailed above. Were the goods inspected by the buyer, and separated from the mass of similar goods in stock? If so, and nothing further remained to be done but make the shipment, we are of opinion that delivery was so far complete as to pass title to the seller, notwithstanding that they were by implication yet to be "free on board." In several of the States—for example, New York, Connecticut, New Jersey, Maine, and Virginia—it has been held that the title passes if such be the intention of the parties, even though there has been no separation of the sold goods from the larger bulk in stock, provided the whole are uniform in kind and quality. In the New

Jersey case this was the conclusion after an elaborate consideration of the whole question (*Hurff v. Hires*, 11 Vroom, 581). But the necessity of separation has been much insisted on, and the conclusion stated, perhaps, cannot be considered settled law. Where, however, the goods have been separated, put one side, and the price paid, the seller no longer having even a vendor's lien, it does not seem possible to consider him as anything more than a bailee.

The words written across the face of the bill may possibly involve the manufacturer in liability for damages in case of loss by fire, as they are calculated to mislead the buyer into a false belief that his goods are insured. If by the terms of his policy it covers "goods sold but not delivered," and he agrees to keep the goods as stated, we think the property would be covered by his insurance.

20. A party upon leaving his store at night shuts off his stove as usual, and during the night the gas, having no escape, causes the stove to burst, entirely destroying it, and doing considerable damage to goods and fixtures. He has an insurance on goods and fixtures. Can he make the insurance company pay the loss?

A. The answer will depend on the terms of the policy. Most of these have a paragraph similar to the following; "If any property herein insured be damaged by explosion from any cause whatever, the company shall not be liable unless fire ensues, and then for the loss by fire only." In such a case all the damage caused by the explosion of the gas, if no fire occurred, would come within the exception for which the company would not be liable.

21. Can the insurance on a house be collected if it should burn down while the occupant is in the country, he having closed it for the season? I have been told that you must keep some one in the house or that the insurance will be refused.

A. In most fire insurance policies recently issued there is a stipulation that if the premises "become vacant or unoccupied," without the consent of the company indorsed thereon, then the policy shall be void. If the holder of such a contract wishes to continue it in force, and to leave the premises vacant, he ought to take it to the company and obtain their written consent. In

fact, it would be well if persons obtaining insurance on their property would read over the policy carefully and see what the contract provides.

LIFE.

22. As security for a loan John Doe assigned to me a policy of insurance taken out several years before, "for the sole and separate use and benefit of Mary Ann Doe," his wife. The assignment indorsed on the policy is signed by both husband and wife. The insurance company has indorsed on the policy an acknowledgment of the assignment which is now of record in the office of the company. A clause in the policy reads: "And in case of the death of the said Mary Ann Doe before the decease of the said John Doe the amount of the said insurance shall be payable to his children for their use, &c." Is the above assignment valid? Also, whether it would still hold good in event of the wife dying before the husband? I have paid a large amount in premiums to keep the policy in existence, John Doe being unable or unwilling to pay the premiums. Not wishing to continue the periodical payments I am anxious to get a paid-up policy for its present value. Could I demand of the company a paid-up policy payable, on proof of death, to myself and not to the wife of the assured?

A. The assignee, if Mrs. Doe should die before her husband leaving children her surviving, could not take any title from the assignment, and it would be worthless in his hands. If the company chooses to issue a paid-up policy, it is his best course to accept it, as he will place no more money at risk. We doubt if the company will accede to his request unless all the parties join in it.

23. If a life insurance policy is taken out in the name of a stated beneficiary, can the name of another beneficiary be substituted in the identical policy, or is the only mode of effecting the change by letting the first policy lapse and taking out a new policy, the applicant being at the disadvantage of a higher rate of premium, or possibly unable to get a new policy by reason of failure of health?

A. The name cannot be changed except by the legal consent of the beneficiary (who must be of full age) and also of the insurers.

24. What have been the decisions bearing on life policies containing this clause: "by self-destruction or suicide," if, or if not followed by "sane or insane," when the holder has committed suicide?

A. When there is no reference to insanity in the policy, and evidence has been introduced to show that suicide was commit-

ted while suffering from aberration of mind, the courts have generally ordered the payment of the money; but where the other words are added, suicide forfeits the contract.

25. A has his life insured in favor of his wife B; the policy reads "and the said company do hereby promise and agree to and with the said assured, his executors, administrators and assigns, to pay the said sum to the said assured, his executors, administrators and assigns, on proof of the death of the said assured, said sum insured being for the express benefit of B, wife of said assured." B died intestate, leaving children by A. A married a second time and is now dead; his second wife C has no children by him, and he also died intestate. Will the children of B have the sum insured, or will it go into the personal property, so that C will have a share of it?

A. If the wife accepts the beneficial provision in her life time, and makes no disposal of it by will, at her death one-third is held by her husband, and the remaining two-thirds vests in her children.

26. In the case of the disappearance of a person on whose life there is an insurance policy, is the amount usually paid on the giving of satisfactory bonds?

A. No life insurance company would feel justified in paying the sum insured without some evidence that the person upon whose life the policy was issued was actually dead. This evidence might be furnished by the lapse of time, and other probabilities, so that, satisfactory bonds being given, payment would be made. But mere disappearance by itself would not be sufficient.

27. What practical effect, if any, has the law passed May 5, 1878, entitled "an act for the relief of policy-holders in life insurance companies," had in relation to policies in existence prior to the passage of the act? I learn that some companies hold that this law is only applicable to policies taken out after the passage of the act.

A. The act referred to permits wives, with the written consent of their husbands, to assign policies on the lives of the latter for the benefit of the former, whether issued before or after the passage of the act. The language is clear enough to leave no room for dispute about the meaning of the law, and if it does not apply to policies issued before its passage it must be because it violates the obligation of a contract, and is therefore unconstitutional. If a policy made before the act was passed contains

a specific stipulation that it shall not be assigned, such an objection, no doubt, can be maintained, since the contract cannot be annulled by the subsequent legislation. But there is no implied contract of this kind, which the legislature is compelled to respect. It was once the policy of the law that "things in action" as the legal phrase runs, should not be assignable; but when the policy was changed there was no vested right that the old law should still preserve the non-negotiable character of any such property. We are quite clear that in the absence of a distinct stipulation in a policy made in this State for the benefit of a wife before May 25, 1879, that it shall not be assigned, the law of May 5th makes it assignable, operating alike on old or new policies.

28. A gentleman has a policy of insurance on his life made payable to his wife, and his wife dies, leaving two children. After his wife dies, one of the children dies, leaving one child. Is the child of the one dying entitled to its parent's share? The policy has been running over twenty years.

A. The legal heirs of the wife living at the time of the husband's death will be entitled to the money precisely as any other property will descend.

29. When is the premium on a life insurance policy payable, when the due date falls on a Sunday or a holiday? Can a company refuse a check tendered them the day before, but dated on such holiday or Sunday? or, if the premium was not paid until the following day, could they cancel a policy which contains the clause: "Not disputable for any cause whatever?" Also, would it make any difference about the payment of the premium on a policy without this clause?

A. It is usually understood that when a premium falls due on Sunday or other holiday, it is to be paid the day before, but we do not think the company should be very exacting in this respect.

30. Does the act of renewing a policy of insurance create a new contract, or is it a mere continuation of the old one? If the former is the case, when a party pays the premium for his life insurance before it becomes due, and dies in the meantime, should not the money be refunded under the doctrine that there is an implied contract to return money paid on a consideration which happens to fail?

A. The money thus freely paid not being contributed under a misapprehension or mistake, cannot be recovered.

31. A policy in a life insurance company contains this clause.

"It being understood and agreed that if after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then upon a surrender of the same, provided such surrender is made to the company within 12 months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes or credits that may have been received on account of premiums; that is to say, if payments for two years have been made it will issue a policy for two-tenths of the sum originally insured; if for three years, three-tenths, and in the same proportion for any number of payments."

The insured has paid five annual premiums in cash, but has retained the original policy for several years. Does the failure to exchange policy forfeit his claims to paid-up insurance "acquired under the value of the old," all other conditions having been fulfilled by the holder?

A. If any unpaid premiums are more than 12 months due, the holder has forfeited his right to a new policy on the conditions specified.

32. In an insurance policy in which a friend of mine was insured, it is stated in policy that said company do promise and agree to pay to and with the said assured, his executors, administrators, and assigns, after due notice and proof of the death of said assured, said sum being for the express benefit of N. D., wife of said assured. His wife died about 1867, he married again, and he died in 1877; does the sum for which he was insured revert to personal estate or to the heirs of his first wife?

A. If there were no children of the first wife we think that on her death, without having assigned or bequeathed the policy, it passed to her husband, and on his death went to his heirs. This opinion is on the supposition that the policy is silent as to the persons who should take after the wife; if the promise was for her benefit or that of her children, or heirs generally, that provision would control.

MARINE.

33. I shipped goods to a foreign port and insured them here free of particular average. By the stranding of the vessel a portion of the goods became badly damaged, and a claim for loss is presented to the underwriters, who refused to allow it on the ground that the term *f. p. a.* covers a total loss only. I am informed that English underwriters allow such claim for damages if caused by the stranding of the vessel. Are the New York underwriters right in refusing to allow the claim?

A. The form of the policy here differs from the one referred to under which a partial loss is provided for in such cases in England. There, the clause exempting goods from particular

average is limited by the words "unless the ship is stranded," which in later years is often made to read "unless the ship be stranded, sunk, or burned" Here the exception is absolute, and there can be no claim under the policy if the goods be actually landed, no matter how badly damaged by the perils of the sea.

34. I apply for \$1,000 insurance on one-sixteenth of a bark valued at the same, and when the policy comes to hand it reads "for \$1,000 on bark—for the term of one year from—," etc. In the margin it reads: "Sum insured \$1,000," and "Vessel valued at \$16,000." Now should it not be exactly as my application, and could not the insurance company say, should I make a claim on them for partial loss, "this vessel is only half covered, the \$1,000 being on one-eighth, and we will pay you half your claim."

A. The insurance company is liable for the sum it insures. If the owner's interest was actually worth \$2,000 and he chooses to insure but half of it, that is his lookout, and no concern of the underwriter.

35. If under a certificate of insurance a claim for damages is payable in Europe, have the consignees a right, when aggrieved, to take legal steps against the underwriters' agent there, or can they do so only against the company here?

A. The agent abroad, if representing the company, may be served in most countries with notice of the suit.

36. Will you furnish your views on the following question, caused by the new custom of masters of freight steamers chartered for a direct voyage from American Atlantic ports to a port in Europe, of stopping at Sidney, C. B., for coals without giving previous notice to the shippers of the cargo of their intended deviation from the voyage laid out?

1. Is such a deviation made for the convenience and benefit of the ship, and not caused by accident or other similar causes, a case of bar-ratry within the scope and meaning of the word, and more especially when the aforementioned coal clause is not inserted in the charter party?

2. Does such a deviation, made without the approval or knowledge of the shippers, vitiate their policy of insurance on cargo?

3. In such case are the assured compelled to pay the additional premium demanded by the insurers, or are the latter required to look to the vessel for payment of the same?

A.—1. The insurance stands on a different footing. If the policy was taken out for a direct voyage from port to port, with no permission to call, the reservation of the right in the charter

party would not save the contract, and the insurance would be vitiated by such deviation. Only in case of necessity, arising from some unforeseen emergency due to the peril of the seas, would such a deviation be permitted within the contract of insurance. If the insured wishes to protect himself in case of deviation, he must have the consent of the underwriter indorsed on the policy.

2. We notice in the charter party another clause, of at least equal importance, affecting the question of insurance. It is the permission given to the steamer "to tow and be towed, and to assist vessels in all situations." An insurance made by the shipper without a recognition by the underwriter of this permission, would be vitiated by a deviation to engage in towing or thus assisting another vessel.

3. A steamer that undertakes a direct voyage from port to port is required to have a sufficient amount of coal and other outfit for the intended voyage, and a calculation to stop at another port for necessary supplies, without the knowledge and consent of the charterers, is a violation of the whole spirit of the contract. It would hardly be reckoned as barratry unless the deviation was for the master's own purpose and benefit, without reference to the designated employment of the ship.

37. A few months ago I bought goods in Boston at \$25 per ton; the price having advanced, they are now worth \$30. I order them to be shipped by sailing vessel and insured for \$30 per ton. In case of loss can I recover for the amount insured, or will the insurance company in making up the loss, be governed by the invoice price of the goods? (\$25 per ton).

A. If the goods are worth \$30 and were insured for that, this will be the measure of the total loss.

38. A twenty per cent. profit is insured; upon arrival the goods had further advanced. One-half of the goods being damaged are retained by the sellers, though buyers are willing to accept them as sound. Cannot, therefore, the buyers rightly claim the twenty per cent. profit from the insurance companies upon the damaged half so retained, the latter being so far as the insuring buyers are concerned, a total loss. The policy contains this clause: "Free from claim for general average, but subject to the same per centum of loss as if the insurance was on goods. In case a total loss be claimed, the underwriters to be entitled to a

credit of the same per centum of salvage as if the insurance was on cargo, and in case of contribution in general average for any portion of the cargo at customary sound value, this company to be free from claim for loss on such portion." The buyers insured profit only: contract reads "no arrival, no sale."

A. The insured is entitled to his insurance on the profits for the damaged portion, but at the same ratio only that the damaged value bears to the sound value.

39. Insurance was effected on account of freight from New York to two ports in the East Indies, both ports being named in the policy, with one-half per cent. deduction from the premium if only one port was used. At the first port the vessel delivered a portion of her cargo, on which the freight was earned and due.

In event of a loss while proceeding to the second port, was the insured entitled to the full amount of his insurance? The vessel, however, proceeded with the balance of her cargo to another port not named in the policy.

Did the risk of the insurer terminate at the first port of discharge?

If so, is not the insured entitled to the reduction of one-half per cent. premium?

A. The statement of the case is not very clear, at least not sufficiently so to enable us to pass upon it without supposing some additions. If the insurance was to a specified port at a specified premium, "with liberty to use a second port, to return half per cent. if the second port be not used, no loss being claimed," which is the usual form of affecting such insurances, and the second port was not used, and no loss was claimed, then, in answer to the third question, the assured would be entitled to a return premium of one-half per cent. as provided.

If the insurance was effected in the form as above, the risk did not terminate at the first port of discharge, but was lessened by so much as was received on account of the cargo delivered at the first port of discharge.

If the policy was a valued policy, then, in case of loss between the first and second port, the underwriter would have been liable for the full amount insured, and without right to claim deduction for the amount of freight collected at the first port of discharge.

The third port not being included in the policy, the risk of the underwriter terminates at the second port of discharge.

40.—1. Marine insurance companies, both mutual and stock, home

and foreign, have of late taken wharf, gin-house, railroad, press and warehouse risks (all on cotton) for periods extending from 5 days to (in some instances) several months.

2. Suppose that under those policies or certificates a fire occurs in a gin-house, on a wharf, or in a warehouse or press, can the insured recover from such marine company by law, if the company should be unwilling to pay? Or when the company is willing to pay, can a stockholder in a stock company, or a policy-holder in a mutual company, enjoin such company from paying for a risk for which it is not chartered?

A.—1. If a company is chartered simply to insure against marine losses, and is not authorized to take fire risks or to protect any property not absolutely afloat, the issue of a policy by its officers for any purpose wholly outside of its jurisdiction would be a grave offense, involving them in personal liabilities, and possibly working a forfeiture of its charter.

2. If the company is authorized, as most such corporations are, to insure against loss by fire, we see no reason why it would not be bound by its contract, nor if it is solvent, how a stockholder, or any other person interested, could interfere to prevent the payment of the proposed settlement.

41. A person owning goods stowed in warehouse of a storage company, and holding receipt therefor, insures them against fire under a floating policy. Wishing to ship the goods he delivers the receipt to steamship agent, who issues thereon bill of lading. The owner then obtains a marine policy on the goods, which are all destroyed by fire, part being in ship and the remainder on wharf ready for loading. Who is liable for the property?

A. All policies for marine insurance read as follows, viz: "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel." In a similar case of a cargo of saltpeter to be loaded on a vessel at Boston for Antwerp, some years ago, the saltpeter was ordered out of store by the master of the vessel and piled up on the wharf, the master having the privilege to do so to consult his own convenience in loading the vessel. A fire broke out in a warehouse on the wharf; the vessel was hauled away from the wharf for her safety; but the saltpeter piled on the wharf could not be removed, and was totally destroyed. A bill of lading had been given for it and it was insured under a

marine policy. It was held in that case that the cargo was never on board the vessel, and the marine insurance therefore never attached. The vessel loaded other cargo and proceeded to Antwerp, where she was libeled, and a suit brought to make the vessel liable under the bills of lading; but it was held that the bills of lading were constructively fraudulent, the goods never having been on board the vessel. The practice of giving bills of lading before the property is on board the vessel is a dangerous one, and may lead to fraud, as well as expose innocent shippers who may suppose that their policy of marine insurance covers them, to serious loss. The mistake of the shipper in this case appears to have been in not paying a trifle additional premium, and making his insurance to cover against fire on the wharf prior to shipment. Not having done this, he must bear the loss.

42. An American importer, buys an invoice of goods from B, a British manufacturer, in July, and intrusts B to insure said goods. B ships half the goods in July and half in September, and insures according to instructions. A buys a second lot of goods from B in December, but gives no instructions as to insurance. The goods are lost. Who is responsible for the loss?

A. If the buyer said nothing about insurance in his first order, and the sellers had insured and he had paid the charges without question, he would have a fair claim, on the ground that he supposed, as a matter of course, the second lot would also be insured. But, as he gave specific directions with the first, which he omitted with the second order, we do not think he can claim of the sellers on the ground of their neglect, and he will have to bear the loss himself.

43. When a vessel in course of her voyage puts into an intermediate port of distress, and for purpose of making necessary repairs, is compelled to discharge part or whole of her cargo, does an ordinary marine policy cover all risks on cargo meantime, the master still holding it in charge alongside, or as near as may be to the vessel?

A. Under such circumstances the marine policy covers all the risks, fire included.

44. We had a quantity of goods arrive on a vessel some time ago, in a damaged condition. It took some time to adjust the terms of settlement and prepare for the sale. Should the "sound value" be the

market price at the day of sale, or the day the ship discharged her cargo, or day of examination?

A. The object of fixing the sound value is to determine the percentage of loss in order to apply this to the insured value, hence it should be taken at the same moment that the damaged value is ascertained, that is, at the time of sale.

45. My vessel, of 498 tons international register, has made ten or more voyages in the North Atlantic from Baltimore, Philadelphia, and New York, and has always carried thirty-five hundred (3,500) quarters of wheat of 60 lbs. to the bushel or 3,300 quarters of corn of 56 lbs., the quantity of corn being the smaller only because there was no more room in the vessel's hold. With these cargoes the vessel has always been surveyed by the proper surveyors.

Now here in Boston, I have just loaded a cargo of only 3,170 quarters of wheat, the ship when loaded having a clear side of 56½ inches and drawing only 17 feet aft and 16 feet 9 inches forward.

I ask you now if the surveyor for the Boston Board of Underwriters, can say that my vessel is loaded deeper than the law allows?

In all the other Atlantic grain ports I have always loaded 750 tons of wheat. Here only 678½ tons.

A. No American statute, or Treasury regulation, so far as we know, fixes the depth to which a vessel may be loaded. It is a matter, however, within the practical control of the underwriters, and the Boston Board have the right to act independently, without regard to the action of the other boards.

46. The bark John was chartered to carry a cargo to Europe, but the vessel leaked so much after the cargo was all on board that the crew refused to proceed in her and the voyage was subsequently abandoned by the owners of the vessel. The cargo was insured, together with some advances made to the ship on account of freight. Can the underwriters refuse to pay the shipper for losses sustained, on the plea that the vessel was declared to be unworthy, with the cargo which she had taken?

A. The risk of the underwriter attaches when the cargo is fairly "shipped"; whether this had been completed at the date specified is a question of fact. Unless the policy contained some condition in reference to the insurance for advances on account of freight, restricting its application, we see no reason why it would not hold in the case described. The above is without reference to the warrant of seaworthiness. As to the latter, it is a well understood maxim, that "it enters as its very foundation into

every contract of insurance on a ship."—Parsons on Contracts, 406. But seaworthiness is assumed as a fact in the absence of fraud, and the proof must begin with the underwriter. If he can prove this conclusively the policy does not attach; and the shipper would undoubtedly in such a case have a recourse to the owners of the ship.

INTEREST.

1. An invoice of goods is sold at a fixed price per pound, interest to be added for three months' note of buyer. The bill is rendered with interest added for 93 days. To this the buyer objects, claiming it should be only for 90 days (although the note drawn in customary form carries the three days of grace,) interest for the three days being usurious.

A. A three months' note usually runs 95 days, although this depends a little on its date; but in this State, (N. Y.,) the legal way to reckon interest to be added to a three months' note, is to take the usance for one-fourth of a year, and add it to that for one-tenth of a month. The law has decided that a promissory note given to pay money in a certain number of months is to be interpreted as a promise to pay in so many months and three days; and therefore, a contract to add interest, or to allow interest, for so many months, is interpreted to mean for so many months and three days. Unless a three months' note can be legally collected without waiting for the three days' grace, the interest on the latter is as much a part of the contract as the interest for the even three months. If "a note for three months" means a note for three months and three days, then "interest to be added for three months," means three months and three days' interest.

2. How can interest be calculated on a sealed note in the following words:

I promise to pay A B or his assignee one thousand dollars for value received and to pay the interest annually. The note is not paid for five years, and what I want to know is, does the interest which is to be paid annually become principal and bear interest?

A. It is the holder's fault if he has not collected the interest annually, or obtained a new obligation for it, and he cannot collect compound interest at any time afterward. Simple interest

on the original principal for five years is all that can be recovered.

3. Will you please state if in figuring interest it is correct to reckon 60 days as two months? Do not the banks reckon 30 days as a month if there should be more or less days than 30?

A. No, it is not correct, nor is it legal in this State (N. Y.). If a note is dated January 1 at 60 days, the legal reckoning is to take two months to March 1 and make that two-twelfths of the interest for the year; this will leave one day and the grace, in all four days, each of which is to be reckoned as one-thirtieth of a month. If the date was December 1 at 60 days, then February 1 is two months, and this making 62 days will leave but one day of the grace to be reckoned.

4. Why is it that a 4 per cent. bond at a premium of \$14 pays $3\frac{1}{2}$ per cent. interest, and at double that amount of premium pays more than 3 per cent. I suppose, without figuring on it, that a 4 per cent. bond ought to be at \$16.67 premium to pay $3\frac{1}{2}$, if at \$133.33 it paid 3 per cent.

A. This writer ignores all computation of the effect of the premium upon the annual earnings. A 4 per cent. bond bought at 114 will pay an annual income of 3.508772, or say 3.51, only on the supposition that it will return 114 at the end of the period. But as it only returns 100, the entire loss of the premium will make a material difference in the average annual gain, and the latter will depend on the time the bond has to run; that is over how many years the loss of 14 is to be distributed. If due in one year, instead of gaining $3\frac{1}{2}$ per cent. there would be an actual loss of nearly 10 per cent. But in reckoning the comparative earnings of a bond at 114, and one at 128, even for one year, the proportion may be easily figured. We have given it above at 114; at 128 it is \$3.12 $\frac{1}{2}$. As 128 is to 114, so is 3.508772 to 3.125. But the period the bond has to run is all important in reckoning its yearly product. Thus a 4 per cent. bond having 10 years to run, bought at 114 and held to maturity, pays only 2.44 per annum; but if it has 25 years to run it pays 3.18. A 4 per cent. bond bought at 128, having 50 years to run, and held to maturity, will give an annual income of 2.94.

5. If a bond of \$1,000 has 14 years to run, at the rate of 6 per cent., what premium will we have to pay on the same to make our money pay 5 per cent., the money reinvested as a sinking fund to pay for the premium at the end of the 14 years and to be put at interest at 6 per cent. and not compounded?

A. The sum to be paid for a 6 per cent. bond of \$1,000 having 14 years to run, in order to pay 5 per cent., under the conditions stated by your correspondent, is \$1,082.85, and \$5.55 is the sum to be paid annually to the sinking fund.

It appears to me that money put at interest for 14 years, to form a sinking fund, must of necessity compound, and in that case a 6 per cent. \$1,000 bond having 14 years to run will pay 5 per cent. if bought for \$1.100, and \$4.49 is the sum to be invested annually at 6 per cent. for a sinking fund.

6. B holds a mortgage made in 1878, bearing 6 per cent. per annum; the mortgagor does not pay the interest till 29 days after it is due. B holds, he (the mortgagor) should pay 29 days' interest at 6 per cent. per annum, on the interest paid after due date. A claims that interest on interest could not be collected by law, also that if claimed by B, it would be usurious; B thinks the interest for 29 days is just, and can be collected by law, and that it would not be usurious.

A. Interest upon interest due, cannot be collected by law, that is, payment of it cannot be enforced; but such a payment is equitable, and the receipt of it, if the debtor is willing or can be induced to pay it, does not constitute usury in the legal sense of the word. It does not violate any restriction, legal or moral.

7. Is it legal for A, a resident of New York, to lend B, a resident of Iowa, at 8 per cent. per annum, interest and principle payable in New York? Or, whether such a transaction is legal when the interest and principal is payable in Iowa only?

A. The rule of law has been distinctly recognized, that where a contract for the advance or loan of money is made in good faith in one place, and to be performed in like faith in another, it is lawful to charge a rate of interest allowed by law in either place. Parsons on Contracts says: "In such cases the intention of the parties is effectuated as a concession to trade and convenience between nations; and if the transaction in itself is not immoral, the rate of interest authorized either by the country where the contract is made or to be performed is allowed to pre-

vail." But the law is equally explicit that "a bill or note cannot be made in one place, and made payable in another, for the mere purpose of creating a liability to pay a higher rate of interest." That is evasion, and subject to the penalties of usury. Where it is done in good faith, and is a bona fide transaction, it will stand.

8. A sells to B some railroad bonds, coupons upon which are payable January 1 and July 1, at a certain price and "accrued interest." The bonds are delivered and paid for February 26. For what length of time is "accrued interest" to be computed?

A. The legal interest in this State is for one month and twenty-five days; the first item to be one-twelfth of the year, and each of the days to be one-thirtieth of a month.

9. A was owing B \$12,000. He paid the interest to the night of June 30th, and on December 17th paid the principal, how much interest was due on that date at 6 per cent., 365 days to the year. B claims interest for the 17th day, while A claims he is not entitled to it. Which party is right? Suppose A borrowed the money of C on that same day to pay B, would not interest commence the morning of that day.

A. The time to be reckoned on a loan or a promissory note is exclusive of the day of date, but includes the day of maturity or payment. This has been legally settled. Some banks charge for both, but the legal method accords with our statement.

10. If A buys on July 9th his own note due August 11th, how many days interest does he make, or on the other hand if he sells his note due on July 9th, due August 11th, how many days interest must he pay? Some say 33 others 34.

A. The only legal way in this State is to reckon that interest would be for one month and two days: the month to be one-twelfth of the year, and each of the two days to be one-thirtieth of the month. This is prescribed by a statute.

11. A three days' draft is presented on Monday, and is payable consequently on the following Saturday (six days from Monday being a Sunday). If I discount it am I to deduct the interest from Monday until Saturday, or from Monday until Sunday?

A. The interest is always reckoned according to the face of the document. If cashed on presentation the drawee is entitled to deduct six days' interest.

12. An obligation payable at six months, bearing interest from its date falls due on the Sunday and is paid the day previous. Should the claim for interest be for the full term of six months, or for one day less?

A. If payable with grace, interest should be reckoned for six months and three days. This is the uniform custom.

13. Does the bank of England when it discounts a note or bill, deduct the sum for which the note or bill is given from said sum, or does it deduct the discount on that sum? In other words, does it take interest on the sum for which the note or bill is given, or for the sum which the bank loans upon it?

A. McCulloch says, "When a bill of exchange is presented at a banker's for discount, it is the practice to calculate the simple interest for the time the bill has to run, including the days of grace, which interest is called the 'discount'; and this being deducted from the amount of the bill, the balance is paid over to the presenter of the bill. This is the method followed by the bank of England, the London and provincial bankers, and by commercial men generally." It is obvious to the simplest reader that this is not the true discount, but it is the method pursued all over the world. A note of \$1,000 has twelve months to run, without grace, and is to be discounted at 6 per cent. The bank takes off \$60 and pays the holder \$940. It has thus lent to him not \$1,000 at 6 per cent., but \$940 for \$60, which is over 6½ per cent. interest.

14. The taking of interest, in advance, on mercantile paper (notes, acceptances, &c.), discounted by banks and bankers, is understood to be the almost universal custom, sanctioned also by all the courts. Such paper usually matures in 60 days to six months.

I desire to ask whether a note for \$10,000 made payable one year from date, and discounted for the maker by a private individual (not a bank or banker), from which he deducts the entire year's legal interest in advance, paying for the note cash to the maker, can, under any decisions of the courts of this or other States, be deemed usurious?

The lender does thus obtain something over the legal per cent. per annum interest, for his money actually advanced; but custom, usage, and finally the courts have decided that this is no usury as applied to banks and bankers discounting mercantile paper of short dates. Is it different as to notes having a longer time to run than ordinary mercantile paper, and discounted by and for persons not bankers, merchants or engaged in trade or commerce?

A. Banks are allowed by statute in this State to take interest in advance; and our courts have recognized the same right in individuals, although this is not provided for in the statute. The court which has sustained this practice however (see *N. Y. Firemen's Insurance v. Ely*, 2 Cowen, 703), said: "It must, therefore, be a negotiable instrument, and payable at no distant day. Under these limitations, the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious." Precisely what is a proper limit of time has not been settled. Under certain circumstances, where the discount was made in good faith, and not with evident intent to evade the usury laws, a year might not be considered too long, but it would be the very extreme limit for an individual lender.

15. Is it a custom in banking business to count 365 days or 360 to the year in calculating interest?

A. In mercantile circles it has been customary for convenience of calculation to reckon 360 days to the year, but it is a dangerous habit where there are stringent usury laws, since it is usury in this State to take 6 per cent. for 360 days forbearance of money. The law here is to reckon all even months alike as one-twelfth of the year, and only fractions of the month as one-thirtieth of the month for each day.

16. A party purchases a bill of goods amounting to \$20,000. The bill (open account) matures May 30, which day is a legal holiday, and therefore is not payable till the following day. On May 29 the purchaser pays \$10,000 on account. Now the question arises as to what amount is due on the 31st. One party takes the ground that the 30th being a holiday the bill was not due till the 31st, and the purchaser is therefore entitled on the 31st to two days interest on \$10,000 prepaid. Another party takes the ground that the day of grace allowed for the 30th being a holiday disappeared when the 30th is used as the average date due and that the 29th and 31st averaging the 30th, no interest should be allowed in settlement. In other words he gains nothing by paying half on the 29th. Another that he is entitled to one day's interest on the payment of the 29th, the same as he would have been if the 30th had not been a holiday, and he had paid the balance on that day instead of the 31st. Which is right?

A. A debtor on open account gives no credit for interest by paying a day or two before the bill is due. In the case cited the claim for interest would not be allowed by law or custom.

17. What rate of interest does the following note bear :

\$500.00.

BINGHAMTON, N. Y., June 30, 1879.

Sixty days after date we promise to pay to the order of Brown & Co., five hundred dollars, at the first National Bank of Pittston, Pa., value received, with use.

JONES & Co.

This note is for goods purchased in New York State.

A. The general rule is that the interest is to be paid on contracts according to the law of the place where they are to be performed, in all cases where the contract expresses or implies the payment of interest. Story on Conflict Laws, sec. 292, 293, 304. A note made at Canada where interest was at 6 per cent., payable with interest in England, where it was 5 per cent., was decided to bear English interest only. See *Scholfield vs. Day*, 20 John., 102. The above note will therefore bear only Pennsylvania interest, which is 6 per cent.

18. A merchant of Bangor buys merchandise of a New York merchant or vice versa. The question is, how interest in the case is to be charged or credited, the rate being 6 in New York and 7 in Bangor, in the absence of any agreement between the parties? *e. g.*, New York sells to Bangor merchandise to arrive, payable in 30 days from the delivery in Bangor. On its arrival Bangor pays prompt cash, deducting 7 per cent. interest for the 30 days. New York demurs, and says only 6 per cent. should be deducted. Which is right?

Suppose Bangor had taken 30 days additional to the 30 of the contract, for that additional time would interest be due at 7 or 6 per cent. per annum, there being no agreement in either case?

A. Where no rate of interest is specified, the law of the place where payment is to be made will govern. Parsons on Contracts, vol. 2, 585. The rules laid down by Judge Redfield in a celebrated case are now accepted: 1. If a contract be entered into in one place to be performed in another, and the rate of interest differs in the two places, the parties may lawfully stipulate for the rate of interest in either.

2. If the contract calls for interest generally, and no rate is specified, it shall be governed by the place of payment, unless it appears that the parties intended to contract with reference to the rate ruling in the other place.

What is sufficient to indicate such intention may sometimes be gathered from the terms of the contract, or from custom, or from outside evidence.

19. OHIO.—Can a person after agreeing to and paying ten per cent. for three years on money loaned at the end of that time, on paying the principal, keep back such part as would virtually reduce the interest to six per cent.?

A. The statute in Ohio forfeits the excess of interest where more than the legal rate is exacted, and only the principal with legal interest thereon can be collected in case of a suit.

INTERNAL REVENUE AND LICENSE.

INTERNAL REVENUE.

1. Is a man who has no license or permit, doing anything wrong or violating the law if he, for the sake of curiosity and study, cultivates some few plants of tobacco, but does not sell the crop?

A. There is no tax on the cultivation of tobacco to any extent. Only those engaged in the manufacture or sale are required to contribute to the internal revenue.

2. Can cigars manufactured in this country be exported without paying an internal revenue tax?

A. A drawback equal to the value of the stamps affixed, is allowed upon cigars that are exported. The exporter's bond is cancelled on proof that the goods have been landed at a foreign port.

3. Is an article manufactured from another article that is subject to internal revenue tax, and on which the tax is supposed to have been paid, subject to such tax? The article in question, or the manufactured article as I may term it, being made of what remains of the other after it has served its purpose, and used for the same purpose in another form after being subjected to certain processes.

A. If we understand the question, it is subject again to a tax. Thus cigars are fully taxed; but if a man takes old cigar stumps, and out of this tax-paid tobacco makes new cigars, they are subject to a fresh tax. It would be the same thing if he could reconstruct the cigar out of the old ashes and vanished smoke.

4. Will you inform me, first, whether a license is required to sell liquors or cigars on commission? Second, whether I can buy liquors for shipment on commission without a license?

A. No city license is required, but the internal revenue tax in each case must be paid before a person can legally deal in

either liquors or cigars. A wholesale dealer in liquors pays \$100, and in cigars \$5, to the United States government.

5. I keep a small assortment of drugs, and would like to know if I can compound a physician's prescription containing among several other things "spirits frumenti or whiskey" without paying revenue as a dealer in whiskey?

A. Compounding in good faith a physician's prescription, in which is only a small amount of spirits as one of the ingredients, would not in our judgment subject the author to a revenue tax.

6. Do medicines, such as oil of turpentine, castor oil or any other medicine prepared according to the United States Pharmacopoeia and labeled accordingly, become subject to stamp duty when put into gelatinous bottles generally known as capsules, globules, etc.?

A. We know of no ruling on the point above raised, but the law appears to be tolerably clear. Section 3,436 of the United States Revised Statutes, exempts from stamp tax any uncompounded medicinal drug or chemical, and any medicine compounded according to the United States or other national Pharmacopoeia, etc., "when not sold, or offered for sale, or advertised under any other name, form or guise than that under which they may be severally denominated and laid down in said Pharmacopoeias, Dispensatories or Journals." If "put up in a style or manner similar to that of patent or proprietary medicines in general," they lose the benefit of this exemption, and become subject to the stamp tax.

7. Is it lawful to sell quinine in packages of five grains and upward, either by peddling or at residence, without a drug license? If not, would it be lawful to sell the same if put up and labeled by a licensed druggist? If unlawful, what penalty could be inflicted.

A. If the drug should be sold under any other designation than its proper medicinal name, or in such a way as to imitate a patent or proprietary medicine, each package would be liable to a stamp duty of one cent, if sold at 25 cents or under, or two cents, if sold at over 25 and under 50 cents, and the penalty for each offense would be \$50. The article might be sold, however, without tax, simply as so many grains "sulphate of quinine," or in the form of a prescription compounded according to the regu-

lar formulas, if not put up in the shape of a patent medicine, or making any pretension to peculiar merits as a proprietary preparation. A State license as a peddler would, however, be needed, at a cost of \$20 a year, for a person traveling on foot, and the penalty for selling without such a license would be \$25 for each offense.

8. Does imported bay rum, when drawn from the original cask into packages of five and ten gallons, require stamping? If so, please inform us what kind of stamp is required.

A. All distilled spirits when drawn into packages of not less than five gallons, for sale, must be gauged and stamped by the Government official, the form of which is prescribed in section 3,321 of Revised Statutes.

9. Are manufacturers of any article other than tobacco or distillers obliged to pay a United States revenue tax? Some three or four years ago there was such tax imposed upon manufacturers generally; has it not been repealed?

A. The Internal Revenue Stamp act applies to manufacturers of matches and proprietary compounds (as patent medicines and the like), and also to brewers, neither of which is included in our correspondent's enumeration. The manufacturers' tax, known as such, was partly repealed in 1868, and the remainder ceased October 1, 1870.

LICENSE.

10. Is it necessary for an officer on an execution sale of liquors or cigars, to obtain a permit or license from the Collector of Internal Revenue, and would he infringe on the internal revenue laws by selling such articles on execution without license or permit?

A. A special tax is not required to be paid by an officer of State, or of the United States, for selling liquor or tobacco on execution, or other judicial process. Nor is any permit for that purpose required under the internal revenue law.

11. We may have occasion to send traveling salesmen to the different States in the Union, for the purpose of selling our goods by sample. Can you inform us whether special licenses are required in separate States, and if so, which and where we shall make application for same?

A. In most of the States licenses are necessary. Pennsylvania is gridironed with local license laws, too numerous to be

separately referred to. In Philadelphia, and some other counties, the County Treasurer is the official to whom application must be made for license to sell by sample; hawkers' and peddlers' licenses must be obtained from the courts of Quarter Sessions. In New Jersey hawkers' licenses are granted by the Governor, on recommendation of the inferior court of Common Pleas; a fee must also be paid to the County Clerk. In Ohio and Iowa, County Auditors issue licenses. In Indiana, County Treasurers. In Illinois, such licenses, where they are required, are local, and the town or city financial officers have the matter in charge. In Missouri, the County Collector. In Wisconsin, the Secretary of State. In Virginia, the township Assessor or City Commissioner. Texas imposes an annual occupation tax upon every commercial traveler, payable to the State Comptroller, but a three months' license may be had pro rata. In West Virginia, the Assessor for the proper assessment district must be applied to.

12. Is it necessary for us to take out a city license for one or more trucks, owned and employed by us in receiving and delivering goods, in the regular course of our business; and also whether the fact of our making any charge for cartage affects the question?

A. If our correspondent uses his own trucks to deliver his own goods, and makes no charge for such delivery, he need not have them licensed. But, if he charges for cartage, he must pay two dollars a year for one-horse, and three dollars for two-horse carts.

13. Has the grower of tobacco the right to sell a case, or a part of a case of tobacco without internal revenue license, such as jobbers have? And what license do they have to pay? If growers are required to have license in the above case, would it be a penalty for the grower to accept pay from jobbers who are around collecting samples?

A. A dealer in leaf tobacco is required to pay a tax of \$25, but no farmer or planter is required to pay a tax for selling his own production or that of his tenants paid to him as rent, provided he must not retail or peddle it to consumers, or to persons who are not licensed dealers, or for exportation.

14. A fruit vender sets up a large stand on the sidewalk in front of my house without permission; have I a right to order him away,

and if he refuses to go, what must I do to have him removed? Can I demand rent from him?

A. Our correspondent can have him removed summarily, unless he has a permit for his stand from the authorities; and if he has, the latter can get it revoked on a proper presentation of the matter. The Bureau of Incumbrances Superintendent will take the matter in charge on a proper complaint. He may be allowed by our correspondent to stay, if permitted by the authorities, on payment of compensation.

INTESTACY.

1. 1. If a single man dies without leaving a will who would inherit his property if he has brothers, sisters, and parents living?

2. If a married man dies without leaving a will, having a wife but no children, what disposition does the law make of his property?

3. Who would inherit the property of a single man leaving no parent, brothers, or sisters?

A. 1. In the first case specified the father inherits, except that if the intestate has received real estate from his mother it goes back to her for life, and then to his brothers and sisters, or their representatives.

2. In the next case the widow has one-third life interest in the real estate, and one-half the personal estate absolutely, after payment of debts. If there are no parents, brothers, or sisters, the widow takes the whole. The real estate, subject to dower right, follows the same course as in the first instance.

3. The intestate's property would go to his other collateral relatives, if any; if none, then it would escheat to the State.

2. My father died leaving mother with three children, and some property in real estate. He died without making any will. We were all in our minority when he died, but we have since attained our majority, and we have been receiving our share of the income until my brother's death. The question I would like to have you answer is this: Is my mother entitled to my brother's share of the income, or, must it be equally divided between her and the brother and sister? And, who has to pay his doctor's bill and funeral expenses?

A. In this State the debts and funeral expenses of the deceased brother must be paid out of his share of the inherited estate or his other property, and all the rest of his personal prop-

erty, he never having been married, to be divided equally between his mother and surviving brother and sister, share and share alike. His real estate goes to his mother for her use during her life, and then descends in fee to his brother and sister.

3. If a married woman dies in this State leaving property, land, bank stock, and household furniture, and makes no will, is her husband entitled to any of the property, if they have never had any children? If so, what proportion?

A. The husband will take all the personal property, but will have no interest in the real estate.

4. A widow dies intestate, leaving two sons, the one being a step-son; to whom will the property, both real and personal, belong? The greater part of the property came from an insurance left to the widow by the husband when he died.

A. If we understand the statement, the husband insured his life for the benefit of his wife, and she came into possession of the money at his death. Afterwards she died (without making a will), leaving property both real and personal. Her son will inherit it all. The step-son is not an heir of hers, and is in no sense of her blood. If she had only a life estate in any of the property and it was thus left by her husband, of course the children would inherit an equal interest in that at her death. But if the property was hers so that she could dispose of it by will, her son will inherit it all.

5. In case of a married lady living in this State, dying intestate and leaving a husband, how is the real and personal estate divided? The lady never had any children.

A. By the statute of distributions in this State, the husband has the same share in the personal property of the wife that she would have in his if he died intestate; but this does not apply (by an oversight in the law, as we believe), to the estate of married women who have no surviving descendants. In the case cited, therefore, the husband can administer on the estate, and claim the whole personal property. The real estate would go to her heirs, he having no life interest from the fact that he had no children by her.

6. Cr.—In regard to the law in Connecticut, if a man dies leaving

an estate, but no children, what portion of property does the widow receive, if any, as her own?

A. If there are no children, nor legal representatives of children (as grand children), the widow will be entitled to half the personal property for ever, and one-third the real estate for life.

7. N. J.—In case of a bequest of real estate to a minor subject to a life interests of another person, and the minor dies, does the property go to the minor's or testator's heirs? Do brothers and sisters inherit before parents when the property came from neither of the latter? Is the law in New Jersey different in these respects?

A. Taking it for granted that the testator died before the legatee, so that the bequest was vested in the latter at the time of his death, the estate, in New York, New Jersey, and everywhere else, would go to his (the minor's) heirs. The laws governing descent differ somewhat, however, in New York and New Jersey. In the latter State, the property would go to the intestate's brothers and sisters, in preference to the parents. In New York, the estate not having been derived from either of the parents, it would go to the father, or if he is not living, to the mother, in preference to the brothers and sisters.

JUDGMENT AND EXECUTION.

EXECUTION.

1. I have a judgment against a party who has bank stock in his own name, but who has obtained a loan upon it for about one-half its value. Is there any way by which I can levy and sell or get possession of the stock? Is it the property of the party who holds it as security until his claim is paid?

A. The stock can be levied upon, and the equity in it, above the lien, held to satisfy the judgment.

2. A person fails in business in this State and owes me. I obtain judgment against him, but can get hold of no property to satisfy the judgment. Is there any limitation in time to that judgment? I find my debtor has acquired and holds property in Massachusetts. Can I do anything to recover my claim out of his possessions in Massachusetts?

A. In this State the judgment ceases to be a lien on the property of the debtor 10 years after it is docketed, but it remains in force for 20 years, so as to permit the issue of execution

upon it. The way to reach the property in another State is either to bring the debtor up on supplementary proceedings, examine him as to his possessions located elsewhere and compel him to pay the debt out of them, or to commence suit in that State on the judgment obtained here.

3. A sues B before a police judge in Brooklyn and obtains judgment against him for say \$150 ; the judgment is placed in hands of a constable for collection, who levies on property of C, living in the same house with B. C serves the constable with a written affidavit that the goods levied upon belong to him and not to B, but nevertheless the constable refuses to give up the goods. Thereupon C brings a replevin suit in the county court, gets his goods back, and a judgment against the constable for costs and damages, amounting together to \$180. Execution is issued but returned unsatisfied. After that the constable is brought up under supplementary proceedings and swears that he has no property, and that he did not require A to give bonds to hold him harmless for levying on the wrong person's property. Now this is an outrage. Does the law allow such an irresponsible person to levy, to satisfy a judgment, indiscriminately on *any* person's property and put him to trouble and expense, leaving the injured party no redress ?

A. Chapter 788 of the laws of 1872 points out the remedy in such a case which is by suit on the constable's bonds. It seems that leave of court must first be obtained.

4. A holds a judgment against B for \$2,000 ; B has money left him by a relation in Europe ; A sends a copy of the judgment to a lawyer in that country, requesting him to claim it for him. After waiting a few weeks, A receives a letter from the lawyer stating that it is impossible to claim the money on the papers sent, as he is obliged personally to appear at court in that State and sue for the same. As circumstances will not permit A to visit that country, you will greatly oblige us by advising him what method to pursue.

A. The judgment may be legally assigned to some one who can sue on it abroad, but the better way is to bring the debtor up in the place where he resides and the judgment has been obtained, and upon examination, and disclosures of the property, procure an order of the court for payment out of it.

5. Will you kindly inform me if a patent can be sold by the sheriff under the following conditions :

Two men enter into a partnership for the manufacture and sale of a patented article. One furnishes the money, the other the patent. After working a little over a year they have not succeeded in getting the

article into market, and cannot meet their payments. Now if the landlord sells them out to get his rent, can he sell the patent, or is that exempt from the company's debts?

A. A patent can be taken on execution and sold like other personal property. A landlord can not seize it for rent, unless it has been pledged as security, without he gets judgment and then takes it on execution. If fixtures, machinery, etc., are mortgaged, the patented right for which these were to be employed would not be involved unless it was expressly covered by the terms of the lien.

6. A dies leaving a widow and two children. By the terms of his will (which is now being contested by one of the children, and is yet undecided) he leaves, after several bequests, a large portion to his widow, and upon her death, that then her portion is to vest absolutely in her son J. Now I have a judgment against this son J. Has he any interest now that I can sell? Can the sheriff levy upon the expectant estate he is to receive upon his mother's death? and, providing he can, must the surrogate's leave be obtained before execution can issue?

A. A *vested* future estate is liable to execution. And an estate is vested when there "is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate." (Moore v. Littel, 41 N. Y., 66.) Accordingly, if the will is established, and contains no provisions which operate to defeat this definition of a vested future estate, the son's interest may be sold under execution. The Surrogate's leave is unnecessary.

7. A is a farmer living on a hired farm, has had horses, cows, sheep, and such utensils as were necessary to work the farm. He sells all his personal property (such as cows and horses) to B, with exception of one double wagon and one mowing machine, and leaves the farm. Now C holds a note against A and has got judgment against him; can he take the mowing machine and wagon for such debt if there is no other claim on them, or are they exempted property?

A. Necessary "working tools and team," not exceeding in value \$250, owned by a householder, or person having a family for whom he provides, are exempted from execution for any debt, except the wages of a domestic or the purchase money of the articles themselves. (Section 1,391, Code of Civil Procedure, 1877.) The provision is substantially the same as that previously existent, under which it was held that a "threshing ma-

chine" was not exempt (*Ford vs. Johnson*, 34 Barb., 364). The mowing machine, therefore, is no doubt liable to be taken on execution. The wagon, not actually belonging to a "team," is probably in the same category, though this may not be quite certain.

JUDGMENT.

8. A person gives a note, which is not paid at maturity, and the holder takes judgment by default; after some time the maker is in position to pay, asks for a statement, remits the amount and gets a receipt in full; he finds, however, that besides the interest, the cost of the judgment amounts to \$28.89, which appears to be excessive. The question now is what is the cost of a judgment obtained in the Supreme Court of Orange county? Is the plaintiff entitled to include the fee paid to his lawyer, without being authorized by the court, and should not the debtor have his note handed back to him, as also the judgment, or a copy of same, so that he can see what he is legally bound to pay? In case of overcharge by the plaintiff what is the remedy?

A. The costs taxable in such a case depend upon the course of pleading in the action, that is to say, the point at which the default took place, the number of defendants served, if more than one, and other particulars wanting in the above statement. They seem, however, as our correspondent thinks, excessive. The question can be determined by sending to the County Clerk of Orange county for a transcript of the judgment. The surrender of the note is a matter of indifference; not so, however, the entry of satisfaction in the Orange County Clerk's office, and here also, if there has been a transcript filed, which it would be imprudent to leave for the creditor to attend to, since he might be tricky, and prefer to give himself a chance to collect the amount a second time. He should be asked, either to send a certificate of the clerk that satisfaction has been entered, or a satisfaction piece, leaving the debtor to attend to the entry himself.

9. Under present law does judgment before execution have any preference in case of assignment, either against real or personal, or after levy does assignment release from sheriff?

A. An assignment under the State law, which alone is now in force, will neither divest the lien on realty of a judgment ex-

isting from the date of entry nor release personal property from levy.

10. If a note or acceptance unpaid at maturity, and which has several indorsers, is sued on and judgment got against all the parties at the same time, must the execution against the principal be first used before any of those against indorser can be used?

A. The creditor may collect of the drawer, or either indorser, whichever he can realize from most conveniently to himself.

11. Our broker in Liverpool sells for us a cargo of merchandise to a firm in Scotland. Buyer receives and pays for cargo, but claims reclamation. Our broker investigates the claim, and is satisfied that it is unjust, and would not have been made if the market for the goods had not declined between the time of purchase and arrival of the goods in Scotland, so declines to entertain or consider the claim, and we supposed the matter was at an end. Now, after a year or more has passed, we are served with a notice of a suit against us in the Exchequer Division of Her Majesty's High Court of Justices in England, by writ of that court dated first day of May, and we are ordered to defend that suit within six weeks from notice, or judgment will be given against us. Please inform us if a decision of an English court can effect a citizen of the United States, and if so, how such a decision could be carried out.

A. A judgment recovered in an English court could be followed by levy upon any property of the defendant found within the Kingdom. In this country the judgment would be without effect, until after suit brought upon it, and judgment obtained here, the same as upon other evidence of debt.

12. A brings suit against B, C, and D on a contract for \$400, recovers judgment against B and C for full amount, and against D for \$100.

B is forced to pay the entire judgment and has it assigned to E. What claim has B, under these circumstances, against C, who is jointly liable for \$400, and against D who is jointly liable for 100? Can he issue execution against C for the \$400, and against D for \$100 or against first, and then against C for the residue, or, being jointly liable with C and D, can he only recover one-third from D of the judgment against him, and one-half from C of the judgment against him, the balance being his share of the liability?

A. If the \$100 against D is included in the \$400 to be paid, B can recover \$100 from D and \$150 from C, as their respective contributions.

13. Will a sheriff's sale of real estate, under judgment obtained in court against a husband, take away the right of the wife as to dower in said real estate, in the state of New York? Is the law in regard to that the same in New Jersey?

A. In all the States, as far as we know, where the wife has a right of dower, such a sale of real estate is subject to her interest, which cannot be taken from her without her consent by a judgment against her husband.

14. In this State, (N. Y.,) we believe a judgment ceases to be a lien against real estate in ten years. Can a judgment be renewed to take precedence of a mortgage given after the original judgment is recorded?

A. Before the Code of Civil Procedure, adopted in 1877, the question proposed by our correspondent was considered one of such difficulty that the framers of the Code declined to express an opinion what the state of the law then actually was. For the purpose of making it clear hereafter, however, it was provided in the Code that judgments hereafter rendered, should constitute a lien for ten years only after signing the judgment roll, but that execution might nevertheless issue thereon after ten years, upon recording a previous notice containing certain specified particulars. It was also particularly enacted that the lien of the judgment should not be renewed until the filing and indexing of the notice. Under this provision, a mortgage, or other incumbrance, executed during the ten years of the original life of the judgment, is let in on the expiration of the ten years, and the judgment lien is remitted to a junior position.

15. A so-called judgment note was given by a firm in Illinois in 1858. The note was signed by the firm, as was also the confession of judgment appended below. Neither of the firm signed the confession of judgment in an individual capacity. Is the note outlawed? And is the confession of judgment binding, or null and void. Suit has never been brought for the collection of the note, and nothing has been paid on it.

A. The laws of Illinois require that confessions of judgments shall be entered in court with certain formalities, and unless this has been done in the above case, the note is barred by the Statute of Limitations. If, on the other hand, judgment has been duly entered, it may be revived by *scire facias*, or be sued on in an action

of debt against the partner or partners who signed the confession, and we think that he or they would be held, the want of a seal having been incidentally treated by the Illinois Supreme Court as insufficient to invalidate a power to confess judgment. But one partner could not bind another by his signature to the power, as the same court distinctly held in *Stoo v. State Bank of Illinois*, 1 Scam., 428.

LANDLORD AND TENANT.

(SEE ALSO LEASE.)

LANDLORD.

1. A lets to B for one year a cottage at \$400. The tenants, man and wife, find themselves afflicted with the prevailing trouble, chills and fever. Their doctor, unable to account for the attack, falls back on the theory of sewer gas. An expert of the Board of Health is called in, who suggests alterations in the plumbing, unusually extensive. What are the rights of landlord and tenant in such a case? Is the landlord compelled to make the alterations, or does refusal affect the lease, yet some months to run?

A. It is not so much a question between the landlord and tenant as between the former and the city authorities. The Board of Health in our large cities are given such arbitrary power that they may compel such changes in plumbing as their whims or fancy may suggest, and the landlord has no redress.

2. "A" holds a chattel mortgage on "B's" stock of goods for \$1,000 and when the time expires forecloses, and only realizes \$600. "C," who is "B's" landlord, then looked to "A" for \$100 rent, due him from "B" which he claims would have been paid if "A" had not foreclosed. Could "C" in any case look to "A" for rent due him from "B"?

A. If A after foreclosure occupied the premises, he may be held for rent during his occupancy, but cannot be held as a result of the foreclosure proceedings.

3. Tenants of mine relet a portion of their store for a year to May 1, prox. rent payable monthly, and having failed before the expiration of their lease, turned over the care of this and other sub-tenants, and the collection of their rents, to me. After remaining in possession of the premises nearly a month after the failure, and after the transfer to my charge, as stated, of which he was cognizant, he moves out, and declares he is not liable for rent any longer. I claim his respon-

sibility does not terminate until 1st May, and that I can collect by suit if he refuses to pay.

A. Cannot enforce the sub-tenant's lease, there being no privity, either of estate or contract, between them. *Jennings v. Alexander*, 1 Hilt., 154.

4. I leased a house in this city to a man ; he died before the lease expired, leaving no will. Can I hold this man's children or widow to keep the house for the unexpired term of the lease ?

A. Only a man's estate can be held to make good his contracts. Neither his widow nor his children, out of their earnings, can be compelled to contribute to this end. As far as his estate will go, the rent to the end of the unexpired lease is collectible.

5. A verbally leases a store to B for \$10,000, he paying \$2,500 in advance for one quarter. C, occupying the premises, claims to hold possession also under a verbal lease from A, and refuses to remove. Both B and C claim to have witnesses to the contracts. What are the legal rights of the parties ?

A. B can recover back his advance payment, and whatever direct damages he can show that he has suffered.

6. I rent a house for one year, the agreement being made verbally in the presence of a witness, the landlord agreeing to keep the roof, pipes and permanent fixtures in order. If he fails to do so within a reasonable time after my notifying him that certain repairs are needed, can I have such repairs done myself and deduct the cost of the same from my rent ? Also under the above agreement who is responsible, myself or the landlord, if outside panes of glass are broken by boys whose parents cannot be found ?

A. As far as the covenant to repair goes the tenant can, on refusal or neglect of the landlord, after due notice, to comply with his agreement, order the repairs himself, and make the charge a counterclaim for the rent. Beyond this limit, as in case of the broken glass, the burden of repairing is wholly with the tenant.

7. When a new building is rented as a residence, is it the duty of the owner of the building to put in the chandeliers and brackets for gas burners, unless by special agreement ?

A. Gas-fixtures are not an essential part of the realty : and the owner is not required to furnish them. The tenant must

supply them for himself if the landlord does not do it, and in this case may remove them when he leaves, or sell them if he can to his successor. In later years, in this vicinity, and indeed wherever gas is used, the owner of the house designed for rent generally puts in the gas-fixtures, because their absence is generally a bar to the letting of the premises, and he can get more than the interest on their cost in the price of the lease, but he is not required to do it unless it is in his agreement.

8. I hold lease of a building with the regular stipulations in printed form, and the following inserted in writing: "And I also agree to make such repairs as may be required to the building, except to the roof and damage caused by fire." I have made all the repairs requisite within the building as far as the eye could discover, and put it in proper and tenantable condition. A rain storm occurs and fills my basement say with seven or eight inches of water and mud, and upon investigation I find that the vault foundation wall is defective, having an aperture sufficiently large to admit not only the water, but a couple of cartloads of sand with it, which had been used to cover over a new pavement just laid down? I also discover a big hollow under the sidewalk which took over two cartloads of sand to fill up. The water and mud in the basement floor caused considerable damage to merchandise. I make out the amount of same and present the bill to the landlord as a part payment for quarter's rent due 1st inst. He says he is not liable, and refuses to entertain it. Now what I want to know is, is he right or wrong? I could not know how the foundation wall stood when I hired the building, as to all appearance it seemed right, and I took it for granted it was.

A. It has often appeared to us equitable that a landlord should be responsible for repairs, the necessity for which arises out of defects of construction and like causes, and not as mere incidents of use and occupation. But it has been firmly settled by the courts that the landlord is not bound to make repairs unless he covenants to do so (Taylor, Landlord and Tenant, 104); that he is under no obligation to protect his tenant from adjoining excavations (Sherwood v. Seaman, 2 Bosw., 127; Howard v. Doolittle, 3 Duer, 464; White v. Mealio, 37 N. Y. Superior Court, 72); and in the contract of letting there is no implied warranty that the premises are tenantable (Mayer v. Moller, 1 Hilt, 491). Hard as it may seem, therefore, we fear that our correspondent must bear the loss himself.

9. About four months ago a pump which I have in my kitchen, and which, by the way, has seen more than fifteen years' service, gave out and left the house and place which myself and family are occupying without any supply of water for drinking and cooking purposes. I repeatedly requested the landlord to have the pump fixed, or a new one put in its place, but, as yet, without avail. Would it be legal for me to have the pump fixed, or, if that should prove impossible, to have a new one put up in its place, deducting the amount of the plumber's bill from the rent?

A. The landlord is not bound to repair, unless there is a provision to this effect in the lease. If there is such a provision, and the landlord refuses, after notice to put the pump in order, the tenant may do it and set it off against the rent. And he may also collect damages from his landlord for all he has suffered by his neglect.

10. A party having improved real estate, insures it and lets it out. Can anything his tenants do vitiate the policies in case of fire? The question is asked, as fire policies contain so many loopholes and require special permits for so many things. A landlord cannot tell whether any of his tenants use oil for lights, or have any combustibles in the house they occupy, or are experimenting with anything classed extra or specially hazardous.

A. There is a form of policy for the benefit of a mortgagee, which insures against fire, no matter what the occupant may do; but we know of no such engagement for the benefit of a landlord as against the violation of the terms of the policy by his tenant.

11. A party has rented by the year an apartment in a flat house. At the time of signing the lease the water flowed abundantly, both cold and hot, in the kitchen and bath room. For some time no hot water can be had, and it looks as though the cold water was soon going to stop as well. Is such a nuisance to be classed among the acts of God, without recourse against the landlord, who must of course feel annoyed, but helpless? or can the landlord be made to share his part of this dispensation, in the shape of a reduction in the rent, which he has been getting in consideration of advantages which existed at the time of making the lease, but which do not exist any longer? Can the tenant throw up his lease? Can the landlord be compelled to furnish such additional pumps as are needed to force the water in the kitchen and in the bath room? The lease expressly says that the landlord is to keep the water pipes in order.

A. The landlord promised to keep the pipes in order, but is not responsible for the pressure of water furnished by the Croton

water department. If the latter were to give out to-morrow, the leases of householders in the city would not thereby be vacated.

12. Is a landlord under all circumstances responsible for damage to merchandise caused by rain water, the roof of the building being defective, and the landlord having been notified thereof? Who must make the claim for such damage, the owner of the merchandise, or the tenant who only sells said merchandise on commission?

A. The landlord is not responsible in this case and the commission merchant must make the loss good if he knew (as appears) that the roof was defective.

13. I was notified on the 5th inst. by my tenant that the roof had leaked and his goods were damaged. No previous notice of a leak or danger of a leak was given. The leak probably occurred on the night of the 4th. I immediately took measures to repair, as I always do whenever notified of a necessity. The leak and consequent damage was of course unavoidable and unsuspected, as landlord and tenant had an interview on the 2d inst. and no mention was made of any leak, while the freezing of water in pipes was mentioned. Tenant sends me a bill for damage to his goods and I decline to pay on the ground that the leak was "an accident happening from a superior agency" (*Harvey v. Hill, Dunlap and supp.*, 193) and for which the landlord is not responsible in damages. Please state if I am right in declining to pay the damage.

A. The landlord is not responsible in this case for any damage to the goods, if the facts are correctly stated.

14. We are joint occupants of premises, each having dealings direct with the owner for our parts of the building; the parties having second floor and cellar, we the remainder of the building. Whose loss is the damage received by the bursting of water pipe? Said burst occurred on the second floor, thereby damaging goods on first floor.

A. Where an accident happens entirely from a superior agency, and without default on the part of the defendant, or blame imputable to him, no action can be maintained against him for damages. (*Harvey v. Dunlap, Hill and D., Supp.*, 193). In case of damages done by the bursting of a water pipe, Judge Robinson, of the superior court observed that "no one is responsible for injury received by their breaking unless caused by negligence or design. If all due diligence is used in making and maintaining the pipes the injury becomes an unavoidable accident, for which no one is responsible." (*Perry v. The Mayor*

etc., of New York, 8 Bos., 504.) Though the remark was possibly *obiter* in that case, yet we suppose it correctly states the rule, and therefore that neither the co-tenant nor landlord is liable unless the bursting of the pipe was in consequence of defective construction, in which case the demand should be against the landlord; or unless the tenant did not take proper care to keep the pipes from freezing, in which case he would be the party who ought to answer.

15. We occupy a store in Broadway which is heated by steam pipes. One of these pipes burst and damaged goods to the amount of several hundred dollars. Can we hold the owner of the house responsible for the amount?

A. The house-owner is not an insurer of his tenant's goods, and cannot be held liable for the damage, unless guilty of gross negligence in the construction or use of the pipes.

16. A owns a house in Brooklyn which he leases to B for three years. At the time the lease was signed the house had a cherry tree in the back yard and a couple of maple trees in front. Has A any right to have any or all of these trees cut down before the three years' lease is up, and against B's will?

Are the trees in the street owned by the city?

A. The owner of the property would not have the right to enter upon leased premises and remove anything that would lessen the value of the same to the lessee, or disturb his quiet enjoyment.

The trees in front belong to the owner and not to the city, but the latter assumes the right to cut, trim, and sometimes to remove the same, and this is often done in a very arbitrary manner.

17. N. J.—A lives in New Jersey, where he hires a house by the month. He demands of the agent and the owner that certain necessary repairs be done, and refuses to pay until they are made. He makes a portion of the repairs himself and says he will take it out of the rent when he pays, but will not pay until all repairs are made. The furniture in the house belongs to his wife. The landlord sends a deputy sheriff and distrains the goods. Must the owner (wife of A) replevin? Can she simply protest and let it go to a sale, and then hold the landlord responsible? and what is the measure of damages? State the proper course to maintain her rights and what are her rights. Must not the landlord proceed by civil process against the husband?

A. Our correspondent should first make sure that his land-

lord is bound to repair, which is not the case unless he has agreed to do so. The right of distress still existing in New Jersey, and furniture in the lessee's possession being *prima facie* liable to seizure, no vindictive damages could be obtained for taking the wife's property; and though she is not obliged to replevy before the sale, it would be to her advantage to do so. The process adopted by the landlord is the one in common use in New Jersey.

MISCELLANEOUS.

18. An agent who has during the past year collected the rent of the store occupied by us, informs us that he has an offer for the store and advises us to make the same offer, and offers to give us 12 hours to think of it, and before the time expires we conclude to do as he advised, and notify him of it by mail and in person. Does the acceptance of the agent's offer bind the owner, and can we hold the store for another year?

A. If the agent had authority to let the premises, and accepted the offer on behalf of the owner, it would bind the latter; but if the agent took the offer to communicate it to his principal, and the latter choose to let the premises to some other tenant, he would not be bound by it.

19. I leased my store to a tenant for five years. I agreed to put the building in good repair. It only wanted a few window glasses in to put it in order, and I was to keep it in tenantable repair. About twenty-five years after the building was constructed, I had an elevator put in. Soon after the party took possession he sent word that he wanted the elevator repaired. I think it was not my business to repair it as it was a fixture, and if the building was to burn down I would not recover for it without a special agreement for insurance on fixtures. The tenant holds it is a part of the building; no mention is made in the lease about the elevator.

A. If there is a sufficient stairway, we doubt if the owner can be obliged under a mere covenant to keep the building in "tenantable repair," to make repairs to an elevator. This is a "modern convenience," but buildings are tenantable without it.

20. I rent a house from a real estate agent, but the owner of the house signs the lease, in which nothing is said as to whom the rent shall be paid. As I have had all the transactions with the broker, if I pay him can the owner call on me for the money paid, in the event of the broker failing or not turning the money over?

A. In order to justify such a payment, it would be necessary for the tenant to prove either express authority, implied authority by virtue of the course of dealings between the parties, or a usage of trade. It is often the case that agents to let property also collect the rents ; and where this has been the course of dealing between any particular parties it would no doubt make payment to the agent safe. But this practice is perhaps not sufficiently general to have become an established usage of trade, which could be relied on by one having no other evidence of the agent's authority than is specified in our correspondent's letter, and we could not advise any one to run the risk. He could pay in a check to the landlord's order, or ask the agent to show his authority to collect.

21. Sixteen months ago I took apartments by the month, payable monthly in advance. Shortly before the 1st of May the landlord desired to know if we intended remaining, and on being told that we did, seemed anxious to know if we would remain throughout the year. He was informed that we certainly should unless something unexpected and untoward occurred. He now gives us less than a month's notice that we must leave on the 1st of April, as he wants the place. The rent has been paid punctually to the hour every month. Are we entitled to a month's notice, and under the circumstances can he oust us before the 1st of May ?

A. Where a tenancy is from month to month no notice whatever need be given by either party to terminate the lease at the end of the month. The tenant may remove or the landlord may eject him, without previous notice at the end of any month.

22. About two years ago we rented our present store, and during our term of occupancy have built an office and other fixtures at our own expense. We now intend to move and desire to remove the office and fixtures. The owner of the store claims we cannot remove them, we claim we can.

A. It is now settled that counters, offices and fixtures put in by a tenant may be removed at the end of his term, providing he leaves the premises in as good condition as he found them, ordinary wear and tear excepted.

23. Can a tenant remove a range which he builds in the wall of premises he occupies ? also stationary tubs ? Suppose he mortgages his furniture, which would include these items, can the mortgagee re-

move them or dispose of them, whether rent is paid or not, without consent of owner of premises?

A. As a general thing tenants cannot remove fixtures which have been made part of the freehold; and this certainly cannot be done unless after the removal the tenant restores the building to as complete a condition as it was in before the improvement was made. Neither a range nor set-tubs, in a private dwelling, would be classed as property that a tenant could mortgage, so that they could be removed by the mortgagee without the consent of the owner of the estate.

24. 1. What is considered to be a permanent fixture in a house that a tenant must not disturb when vacating?

2. Is a partition put up by a tenant to make two rooms out of one in this category?

3. Are stationary washtubs, partly paid by tenants, removable?

A. Domestic fixtures removable by the tenant are defined to be such articles as a tenant attaches to a dwelling-house to make his occupancy more comfortable, and which may be removed without doing substantial injury to the premises, such as furnaces, stoves, wardrobes, gas fixtures, &c.; and also things merely ornamental, as pier and chimney glasses, window blinds and curtains and the like. But things affixed to the house, as doors, windows, partitions, (unless loosely put up with screws,) shelves (if nailed), locks and keys, and the like, he cannot remove, nor without consent can he take shrubbery or flowers he may have planted in the garden. The inquiries by which almost everything may be settled are these: Can the article be removed without injury to the premises? And will the premises be in as good plight and condition after removal as they were before annexation? Stationary washtubs, toward the erection of which the tenant may have contributed but part of the expense, would not be removable at his option.

These remarks do not apply to trade fixtures in a shop or warehouse.

25. A party owes \$25, yearly rent for a piece of ground only. The woman from whom he rented the ground has died, and the rent is now about due and payable, and the question is, to whom is the rent payable. When the woman died, she left what money she had and

personal effects, to an adopted daughter, as she had no children of her own living. The house she lived in and ground around it, was left by the will of her deceased husband, to her use during her lifetime, and at her death it was to go to his brother's children. The ground rented, is a part of this property, and was let to this party last spring, by the woman who has since then died, for \$25 a year, payable next spring. The adopted daughter claims the \$25 rent, and so do the heirs of the real property, viz., the brother's children above named. The rent is really not due until spring, but the party is willing to pay it now to the legal claimant. Which of the two has the legal right to this rent?

A. The proportion of yearly rent earned at the date of the woman's death belongs, we think, to the adopted daughter; though not payable till next spring; the rest of it goes to the brother's children. If the parties will not accept their division, the better way would be to wait till suit, and then bring the money into court and ask that the contestants be impleaded and settle the matter between themselves.

26. Is the signature valid to lease of real estate by an agent, when the lease is for more than one year?

A. An agent has no power to bind the owner by an instrument under seal executed in his own name. If the contract purports to be the landlord's agreement, then the question is simply whether the agent had authority to execute it; but if it purport to be the agent's agreement under seal, it will not bind the owner. (*Dean v. Roesler*, 1 Hilt, 420). Without written authority an agent cannot make any kind of a lease that is good for more than one year. (*Cost v. Martens*, 2 Robt., 437; *Porter v. Bleiler*, 17 Barb., 149.)

TENANT.

27. A party leased or hired a piece of land for the season, that is, from early spring till snow comes in the fall. The land is in grass, and has been used for pasture. Has the lessee the right to plow the land for a fall crop? There have been no papers and nothing has been said about it.

A. If the purpose for which the land was to be used by the lessee was neither expressed nor implied by the circumstances of the hiring, we think he may plow and raise crops. For in such a case a lessee is not restricted in devoting the premises to any lawful use he may choose, unless it materially and essentially affects their condition. If the land had recently been seeded,

however, and this was known to the lessee, it might perhaps be considered an essential change of condition to turn it into plow land again, but we know of no actual authority to that effect.

28. My landlord is not the owner of the building but lessee. Should he not pay his rent can the owner of the building seize property of mine stored therein for such rent? Could he seize such property for the rent of the entire building (it being occupied by several tenants) or only for the proportion of the building rented by me? Are the effects of boarders at a hotel or boarding house subject to similar seizure?

A. The property of the tenant in this State, (N. Y.,) cannot be seized for rent. Only such as is subject to execution can be taken after suit and judgment as for any other debt. A special act gives the keeper of a hotel and boarding-house in certain cases a lien on the baggage of boarders.

29. What advantage results from having a lease of the premises occupied by us placed on record?

What action if any, on the part of a landlord would make a lease for a year or term of years that has not been recorded invalid and depriving the party leasing the premises of their possession, there being no default in the payment of the rent?

Would change of ownership affect our rights on premises leased?

A. The sale of premises, leased for a longer term than three years, if the purchaser took in good faith, for a valuable consideration, without notice of the lease, would cut off the lease, unless it was recorded. This answers all three of the above questions.

30. I rented a property in New Jersey at \$30 per month for one year from February 1, and have paid rent in advance, as stipulated, for February and March. I now find that the property is mortgaged by the owner for \$6,000, and he, being penniless and not able to pay either taxes or interest, the property will most likely be sold by the sheriff and bought in by the mortgagee. Now, sir, would you kindly tell me whether my contract with the owner will hold good for the balance of my year, or whether I will have to give up possession to the purchaser, or be obliged to pay him a higher rent he may ask; also to whom I should pay the rent until the sheriff's sale takes place?

A. A foreclosure and sale of the property will terminate the lease, unless the mortgagee has given his assent to it. The tenant may pay rent to the mortgagor, however, until notified by the mortgagee not to do so, but it is hardly safe to pay in advance, as after notice he would be liable to mortgagee.

31. A leased a partially furnished house to B for one year. Plumbing, both gas and water, soon showed its defects, being inferior in quality and workmanship. Plumber called in by B to repair, chiefly the cesspool, to prevent water flowing into cellar. Who should pay? A or B? On renewing lease A sent plumber to do certain repairs, during which he neglected sufficiently to tighten a screw, and so admitted water causing a leak and damaging ceiling. Who should repair said damage? Landlord and plumber both refuse. If B repair can he legally deduct cost from rent?

A. A landlord is not bound to repair a house unless he covenants to do so in the lease. If he does agree to repair, and neglects it, the tenant may do it after due notice and off-set it against the rent. A plumber, through whose fault or neglect the damage has occurred, is bound to repair it, or to pay all the expense and trouble of the same.

32. A friend of mine in New Jersey has paid his rent monthly in advance for years, but finds it more convenient now to pay at the end of each month. His landlord threatens suit, claiming that the first payment established a contract, although nothing as to the mode of payment was said at the time.

A. The time when a promised rent is to be paid where no provision is made by a written contract, is to be determined in the next place by oral evidence of the bargain; or in the absence of that, "if prior rent has been paid under the agreement, that circumstance with the time and manner of payment, may be necessary implication and in arriving at the correct understanding of the parties as to the manner and time of payment, when the same was not otherwise intelligently expressed." From this quotation it will be seen that the precedent established by the tenant is against him, and in the absence of a specific contract, will be binding upon him.

33. A party rented an apartment in a flat-house; at the time it was not noticed that there was a stable next door, directly under the dining and bedroom windows, and no mention was made of it by the landlord. As the weather becomes warmer, the odor becomes stronger, and almost unbearable; and oftentimes arises so strong at night as to awaken one from a sound sleep, and the rooms always have the detestable smell in them. One of the family has not been well since living in this apartment, and another has recently been taken ill; the sickness of both is attributed to this nuisance. The Board of Health has been appealed to several times, and they required a box to be made in

which to export the manure, but being boxed up seems to make the smell the stronger. Under these circumstances is the lease, which is for a little over a year, binding?

A. The lease is binding, as the conditions described will not vacate the agreement.

34. I have rented in Brooklyn a flat on the first of May with the understanding that the apartments and halls were to be painted and whitewashed, the former in May and the latter in June. The rooms have been painted, but the halls have not yet been attended to. Can I vacate the apartments on this account? The flat would have been \$2 less a month, without repairs.

A. If the flat was rented for a year the lessee cannot lawfully vacate his lease because the landlord has been forgetful of his promise.

35. I live in Jersey City, and rent a house which is very much out of repair; the landlord has promised to put it in repair, but does nothing. Can I withhold the rent, or have the work done and deduct from the rent? Or must I move?

A. Unless the needed repairs are positively part of the contract when the house was rented, the landlord cannot be compelled to make them, and the tenant has only to move at the end of his lease. The lease of a house does not include an obligation on the part of the landlord to keep it in repair, and if he has not specially contracted to do it, the tenant must make them at his own expense, and cannot deduct it from the rent, nor can he leave until his lease has expired.

36. Is a lessee of a house who covenants generally to repair, bound to rebuild the house in case of accidental fire?

A. In this State in case the premises are so injured by fire or other casualty (without the fault of the lessee) that they are untenable, the lessee is authorized by special statute to terminate the contract.

37. An agent let part of my house to a party who represented she was a dressmaker, and after moving in placed a sign on front of the house announcing her business as clairvoyant and doctress. I wish to get rid of her. Must I give her 30 days' notice from November 1, or can I notify her to leave on November 1, and dispossess her then? Can I remove her sign from the house?

A. The occupation of premises for an illegal business renders the lease void, and the tenant may be removed by summary proceeding in the district court. As a person undertaking to practice medicine without license from a regular medical society is pursuing an illegal business, and it is not at all likely that a female doctress and clairvoyant has such a license, so we have no doubt that our correspondent can have his tenant legally removed, without other notice than the court summons.

38. I let a store to a party who nailed strips to the walls, and nailed his shelving and drawers to the strips. He has given up the store and proceeded to take away his fixtures, leaving the strips still affixed to the walls. The taking down of the strips will damage the walls, and as he refused to do anything toward repairing the same, I stopped him from removing his fixtures. What are my rights in this matter? He refuses to take down the strips and threatens suit.

A. The tenant can enforce his right to remove the fixtures. If, however in affixing the strips and leaving them, he has been, or shall be, guilty of doing a negligent injury to the premises, the landlord may recover damages by suit; but he cannot undertake to set off the damage by preventing the tenant from taking his fixtures away. Whether or no the circumstances of the case are such as to support an action on the part of the landlord, we should not care to say without knowing all the details, but we fear not.

39. A hires a house of B for one year with a privilege of two more. A remains two years and then moves. Can B hold A responsible for the third year?

A. If A took the house at the end of the first year for two more he can be held, otherwise not.

40. A party leased from a landlord a store with back rooms adjoining. In the lease it was expressly stipulated that "the store was to be used for the grocery business, and for no other purpose without the written consent of the lessor." No mention was made of the back rooms, as the lessee had had two previous leases of five years extent on the same premises and under the same conditions, and had used the back rooms for dwelling; for this reason it was thought unnecessary to mention in the lease that the rooms were for dwelling, although it was mutually understood that they were to be used for that purpose. Shortly after the lease went into operation the lessee removed his residence from the back rooms and has in turn filled them, despite the

remonstrances of the lessor, with a stock necessary for the feed business—feed, oats, meal, etc. The lessor claims that the lower portion of his building will be ruined, the grain drawing vermin, rats, etc., and its weight tending to weaken the floor. The question now submitted for your answer is, what redress has the lessor and in what manner can this be obtained?

A. From the statement made it does not appear plain to us that the use of the premises described is a violation of the terms of the lease, although it may be an act of bad faith on the part of the tenant. If the provisions of the lease have been violated the lessor may sue for damages, or restrain such use by injunction, at his pleasure.

41. A leases his house or place of business to B by the year, and tells him decidedly that he will not let or lease it for a less period. B expresses his intention of vacating the premises on the first of May, proximo, that being the date of the expiration of the lease. Notwithstanding this B remains in possession of the premises until the 15th of May, and then moves away. Can A collect from B rent for the year, or for 30 days, or rather a month only?

A. In the city of New York a tenant whose lease by the year expires May 1, but who holds over and remains in possession of premises thus leased to him by the year, is liable, at the option of the landlord, for the rent to the first of May following. *Brewer v. Knapp*, 1 Pick., 382; *Ellis v. Paige*, id. 43; *Moore v. Beasley*, 3 Ham, 294, and a score of other decisions.

42. I occupied a flat up town, paying my rent monthly in advance. I have no lease, although I have been in the house 8 years. The premises are untenable; the sewerage is in bad order and the house sinking. I have said to the landlord several times that as soon as I could find a convenient place I would move. On the 29th of June I gave notice to the janitor (not knowing the whereabouts of the landlord) that I was going to leave: to let the landlord know it, I did this just out of courtesy, for I am aware that by the laws of this State no notice is required from either side when the rent is paid monthly in advance. I began to move on the 1st July, and delivered the keys to the janitor on the 3d. As I was going with my family out of town on that day, I told the janitor (on the 29th) to ask the landlord, as I had been such a good steady tenant, if he would let my piano and parlor carpet remain until my return from the country on the 8th. The janitor said, that as the flat could not be rented without repairing (it not having had any during my stay) he did not see any objection. In the interval, and on the 30th, the landlord came and saw my wife! made no mention of any objection to my request, but, on the contrary, tried to in-

duce us to remain, saying that he could not afford to lose such tenants, and offered to make a reduction in the rent, etc. When I came home in the afternoon I had the leases of my present abode signed, etc., and therefore began moving on the 1st. My piano and parlor carpet were removed on the 9th or 10th of July: as soon as I could possibly do it after my return from the country. On the 11th of July the landlord called at the office and demanded his rent for July, which I refused, naturally, to pay. Now he has sued me for it, I don't know upon what grounds. If on account of not having given him previous notice, or because I did not vacate the premises on the 1st sharp?

A. We suppose the case narrated comes under the legal effect of "holding over," and that the landlord can recover by law the rent for the month of July. If true in every particular, it presents a strange case against the landlord character; but one need not be governed by motives of pure philanthropy in order to be successful in a suit for rent.

43. A man owning a house is unable to pay his mortgagers and the house is sold at sheriff's sale. The tenants are in a quandary to know to whom to pay their rent, as two or three agents have been around trying to collect. How will they find out which is the legal one?

A. Wait till the buyer under the sheriff's sale shows evidence that title has passed to him. If the rents had accrued at the time of the sheriff's sale, they belong to the former owner, unless they have been made payable to the receiver, by order of the court, to satisfy a deficiency in the proceeds of the mortgaged premises.

44. Will you please answer the following? A leases a store for one year and sub-lets an office to B for the same length of time. A short time after B takes possession he loans A a sum of money, perfectly secured, and agrees with A that the interest of the money shall be in lieu of rent. The arrangement is renewed for a second year, when after three months A fails. Shortly after he resumes business, having rearranged with the landlord. B holds a receipt from A saying that the interest is paid in full for the year. Regardless of this cannot A collect rent for premises occupied by B?

A. If A got his discharge, the answer turns upon the question whether or no the nine months' rent overpaid by the sub-tenant was a provable debt. If it was cancelled so that his present occupancy is by a new title and upon new consideration, it seems to us probable that A could enforce a demand for rent as

if B had not previously paid it. But if there was no discharge, or, possibly, if there was no change in the occupancy or title to occupancy of the premises, it might be held that, as under such circumstance A could not separate the executory from the executed parts of the contract, as the assignee might have done, the whole must be considered as executed, and B as in possession of an indivisible term, for which full consideration has been received, and therefore that rent is not collectible.

45. A has a furnished house in the country which he lets to B, the lease expiring May 1, 1880. Soon after taking possession B's wife is taken with the chills and fever, which he (B) claims is owing to the house being in a malarial district, although there are no special causes operating to produce malaria. This view is also held by his (B's) physician who says that the wife's health will be permanently injured should she remain another season. On this ground B asks for a release from May 1st next, which A refuses to grant, except he (B) will find another tenant on the same terms for the balance of the lease. Now can A hold B to his contract and sue for the balance of the rent, if he (B) gives up the house, which he threatens to do?

A. We do not think the tenant can lawfully surrender the lease under the circumstances stated, and that he is liable for the rent for the full period for which he originally engaged.

46. A man rents a piece of property with a house, shop, and shed on it. Alongside of the shop is the shed; this he pulls down, and in its place builds another new and larger shed. He is now moving away, and they say he is going to pull down the shed which he built and take the lumber with him. Please state the law on the subject, and oblige.

A. In a general way all buildings erected upon the land of one person by another without any authority or agreement in respect thereto, become a part of the realty, and cannot be removed. But if the shed in question is a trade fixture erected by the consent or permission of the landlord for the convenience of the business the tenant is conducting, the latter may remove it. He must, however, replace the premises in as good a condition as he found them, and this would involve the re-erection of the smaller shed which he removed.

47. Is it necessary to give a tenant a month's notice to surrender possession of a house rented by the year when there is no lease? Also could I get a warrant to dispossess, and have it ready to serve in case the parties held over?

A. In this State (N. Y.) no notice is required to a tenant who has taken the premises for a single year, and he must surrender at the end of his term. To avoid however, any pretext that by a verbal understanding he has re-leased the property for another year, if there is likely to be any difficulty, a formal notice of the termination of the contract may be served upon him. It will take no considerable time to obtain a warrant if the tenant undertakes to hold over, and it need not be secured in advance.

48. A being a tenant of B, and wishing to make alterations, executed lease agreeing to restore premises to original condition. Previous to expiration of A's lease B rents the premises as altered, to C for ensuing year. C obtains from A an assignment of his unexpired lease, assuming A's liability for alterations, but B refuses to release A, requiring the fulfillment of his contract. C, being in possession, refuses to permit this, whereupon B demands from A a sum equal to the cost of restoring the alterations, although he holds C's agreement to restore at end of his term. A sends B in payment of last month's rent a check embodying the words "in full for all demand," which B uses with his indorsement, while still refusing to execute a formal receipt, and renew the above demand through his attorney.

As B suffers no loss, can A be held for damages?

A. A can be held to his contract, but can only be compelled to pay whatever B suffers by his failure to comply. If B suffers no possible damage A will have nothing to pay.

49. If A hires a house of B for the term of five years, on which there is a mortgage, if the lease of A be duly recorded will the foreclosure of the mortgage oust A as the lessee?

A. If the mortgage is given before the lease, the lessee can be dispossessed by a purchaser under foreclosure. Not so, however, if the lease is on record first.

50. N. J.—A friend of mine rents a house in New Jersey on which the taxes have not been paid for three years. The tax collector threatens to levy on the furniture belonging to the tenant, and on which his tax (for personal property) has been paid. Can he do so? If he has such power, what is the tenant's course to pursue? He is bound by the lease for another year.

A. The tax collector may levy on the furniture or upon any property on the premises. By the law of New Jersey the tenant can offset it against the rent, or recover against the landlord.

51. **TEX.**—A rents from B a dwelling house at \$25 per month for 12 months (an agreement made and entered into in writing). While in the possession of A the house burns. Can B collect for the 12 months, and if so, can A compel him to rebuild?

A. We find none, and therefore conclude that the common law rule is in force in Texas. By this law the tenant, unless there is (as there should be) a contrary provision in the lease, is bound to pay rent for the term agreed upon, though the premises are totally destroyed by fire. As to rebuilding, that depends upon the covenants of the lease, but if the lessor has not covenanted to repair he is not bound to rebuild, and can still collect his rent. In this State (N. Y.) express provision is made by law for such cases, and where the building is rendered untenable by fire, the tenant may surrender the lease or not at his pleasure.

LEASES.

(SEE ALSO LANDLORD AND TENANT.)

1. The first of February coming on Saturday, is it not the duty of tenants whose leases expire on the first to vacate on that day? An Israelite says it is his Sunday and he cannot move until the following Monday. The new tenant must leave his premises on the first and wants possession. What course, therefore, under the circumstances, must the landlord pursue to put his new tenant in possession on the first, from which date his lease commences?

A. The tenant should move on Friday the 31st, and our correspondent has the right to insist on this; or if that is impossible, as the Jewish Sabbath closes at sundown on Saturday, a compromise may be effected by his vacating the premises at that hour.

2. A person rents a place of business or loft and pays his rent by the month. He does not tell the owner that he will take the place for a whole year, but does not also state that he will take it by the month, and a written agreement has not been made. Can the person renting the loft vacate it before the year is up?

A. In this city, where no time is specified, the lease expires the 1st of May.

3. Does the lease of a dwelling-house—say for one year—hold good under a foreclosure sale? And if not, what can the lessee do to protect himself against being ejected before the expiration of the lease?

A. A lease by the mortgagor is not valid against the mortgagee, after foreclosure, unless the latter joined in it. The only safe way of leasing mortgaged premises is to obtain the mortgagee's assent; but the lease having been taken without it, we know of no way by which the tenant may save himself from ejection, after foreclosure, by the mortgagee, or purchaser under the mortgage.

4. Clothing firms who were burned out, thinking it too late to make a stock for the following season, withdraw, so to speak, from business for a season. Must they pay their employees who are employed by the year? I place the question on the same footing with a lease, which is broken by the fire. I say a contract with a clerk is also broken when a firm is "thrown out of business" by the act of God or the elements.

A. The fire does not relieve any one from a contract with his clerks or workmen. Formerly, unless it was specially provided for in the agreement, fire did not release the tenant, and he was obliged to continue the payment of his rent to the end of his contract, although the premises were burned to the ground and his landlord might refuse to rebuild. But the statute has now provided that a tenant may surrender his lease upon the premises becoming untenable through fire or other casualty by no fault of his; it does not extend such a provision to a contract between an employer and his clerks or laborers.

5. I have a written lease of store for 18 months from October 1st. The property has since passed into the hands of a receiver, who notifies me that from April 1st, the rent will be increased. Will you please state whether I can be obliged to pay an increased rate for unexpired term of lease?

A. The statement is wanting in particulars necessary to form a positive conclusion. We infer that the receivership exists in favor of a judgment creditor; and it may be said in a general way that if so, and the creditor's lien attached prior to the execution of the lease, the latter is subordinate, and the lessee must make what terms he can with the receiver. If the lease was the prior lien, then the general rule would be the reverse.

6. Last May A hired a partially furnished house for one year, rent payable monthly in advance, with privilege of another year from May 1st next. No time being fixed within which the tenant must decide

whether he will keep it, how soon is the landlord entitled to an answer? In other words how long may the tenant legally and equitably delay his answer?

A. Custom fixes an early date in February as the proper time, but the courts have not, as far as we know, in this State, pronounced whether it is binding in the law. The language of the cases rather inclines to the conclusion that the lessee might have until the last day of his first term to make his election, but this course is not equitable, and we doubt if it would be sustained.

7. If a party rents a suit of rooms on the 3d of the month, can the same party move from these rooms on the following 3d without telling me beforehand of their intentions? Can I not compel them to pay for the remainder of this month?

A. Where property is let by the month, the time begins and expires, without other agreement, on the date of the possession, or renting, and not necessarily on the 1st of the calendar month.

8. In the absence of a lease or agreement between a landlord and tenant, whether the tenant who pays his rent monthly regularly, and behaves properly, doing no damage to the property, can be ejected at the option of the landlord, and at any time he may see fit?

A. If the tenant has hired his house by the year, a written lease is no consequence; he cannot be turned out except at the end of the year, when he must leave if the landlord desires it. If he has hired by the month, he can be turned out at the end of any month if the landlord chooses. The landlord is not obliged to assign any person; he can claim his premises from the most faithful and punctual tenant, when the time has expired.

9. Would a clause in the lease prohibiting the landlord from renting any part of the building for special hazardous purposes be sufficient to keep the former tenant insured?

A. The lease clause referred to would not "keep him insured," unless he considered the landlord his insurer. But such a clause is a good thing for a tenant in an ordinary line of business to insist upon, for the reason that the landlord is thereby held responsible for any change of hazard not covered by the tenant's policy of insurance, and consequently will be particular not to rent any part of the building for extra or specially hazardous purposes.

10. A rents of B a store on March, 1879. Verbal agreement is, that A can stay in the store for at least a year; although B has the privilege of raising the rent from \$2 to \$3 per month from May, 1879. On the 7th of April B orders A to leave the premises on May 1. Can A be compelled to move (if he paid promptly), and if so, can A claim damage for having had expenses etc., which he would not have had if B had told him before that he had to move May 1?

A. If A absolutely agreed for a year's rent, and this can be proved, the verbal bargain is just as good as if it was signed, sealed, and placed on record, and A cannot be put out if he pays his rent, until the expiration of the time. Or, if A rented up to May, with a verbal agreement (which can be proved) that he should then have the privilege of renewal at \$2 or \$3 advance, as might be agreed upon, this would hold, and entitle him to possession. If in this case he is violently dispossessed against his will, he can recover damages.

11. The owner of a building lets the same through a broker to two parties, one to take the store and basement and the other the lofts; but in order to simplify the transaction he prefers having the contract made out only to one of the two lessees. First it was made over to the party that was to occupy the lofts, but a few days later the owner for some reason desired to have the contract changed to the party that had rented the store, naturally with the same understanding as to the subletting by one of the occupants to the other. So when the lease contract was delivered to the store party by the broker, they were asked at the same time to sign also the subletting contract, but being too busy at the time, they promised to do so later, and after a delay of several weeks they refused to sign it altogether, they having meanwhile made up a larger concern, and finding it more to their purpose to use the entire building. Consequently, the party that had hired the lofts from the owner, is thus deprived of their right to use their part of the building, and have to sustain great inconvenience and pecuniary loss in not being able to find a suitable location.

A. A verbal lease, if it can be proved is, under these circumstances, a valid contract. We are inclined to think that the best mode of procedure in the above case is to make a demand upon the owner of the building to perform his verbal contract to lease the lofts, and put the party entitled into possession of them. If he cannot or will not bring this about, he can be made to answer in damages.

12. On the 26th of March, our landlord came to our office and consented to let us have the building we now occupy for another year, at

the old rent, and same terms as old lease. At the time of the contract, only one of the firm was present, and he agreed, verbally, to take it. In the course of a few minutes after the landlord left, he came back and said he wished the lease to run only to February instead of May, but we might have the lease until 1881 if we wished. He was told that such was not the original understanding, but if both of us were satisfied we would let him know on the return of the member of our firm absent, but, in the meantime, we held the place as taken for a year. Instead of waiting to hear from us he let the building at an advance to another party, and now denies he ever let to us. It so happened, however, that our office door being open at the time of the contract, a party with whom we had some business heard the contract, and is willing to swear he heard the facts as stated. We wish to know if we have hired our store; or if we can be dispossessed on the first of May, and what notice, if any, we must give the landlord of our intention to stay.

A. If the above statement can be proved to the satisfaction of a court and jury, you can hold the premises for another year. No notice to the landlord is needed, but it may be well to send him word that the tenants hold to the verbal lease he gave, and can establish it by legal proof.

13. Does not a lease terminable upon a legal holiday oblige the tenant to vacate the previous day?

A. The holiday law in this State only applies to bills of exchange, bank checks, and promissory notes. It does not affect a lease; and if such lease expires on a Sunday or other holiday, the lessee cannot be compelled to vacate the day before.

14. N. J.—A gentleman in New Jersey leased a farm from a person whom he had known for many years, and whom he trusted so much that no written arrangement of any kind passed between them. The terms were for one year with the privilege of two more, at tenant's option, entirely verbal and, I believe, without witnesses. The gentleman and his wife went to work and by their taste, skill, and money, changed a common looking farm house into a neat, cosy cottage, with pretty flower garden and various other accessories of a gentleman's place. So great was the improvement under their hand that the owner sold it for a good deal more, and he notifies them that they must leave it at the end of the first year, and entirely ignores his agreement of two years more, tenant's option. Can the gentleman be turned out thus? what rights has he in the case?

A. A verbal lease for three years is good in New Jersey, and so, it is safe to assume, would be a lease for one year with an

option of two more. The testimony of the parties can be taken to establish the agreement. So if ejected from the premises our correspondent can probably obtain damages of his landlord, and the improvements made by the tenant would no doubt weigh with the jury in making up their verdict.

LOANS.

(SEE ALSO COLLATERALS.)

1. Inform me whether, when receiving during business hours a sum due him with accrued interest for a number of days, a creditor is entitled by law or usage to include in his computation of interest the day on which the payment takes place? I have always been under the impression that interest on money loaned could be charged either for the day upon which it was loaned, or for the day upon which it was returned, but not upon both.

A. The day a loan is dated is excluded from the time it has to run and from the calculation of interest, but the day of maturity is included. (Story on Prem. Notes, sec. 211; Chitty on Bills, ch. 9, pp. 403, 404, 406.)

2. A owes B \$100. B gives C an order on A for \$80. C presents this draft to A who declines to honor it. Immediately afterward, B's workmen whom he owes for wages trustee in due form the \$100, which A has in hand owing B. The wages are proved, and the \$100 is thus absorbed. And now B sues A for \$80, the amount of the dishonored draft, or order. Can B collect?

A. An attempt to hold A as still liable to B for the amount of the draft or order, could be made only on the theory that he was legally bound to accept the draft, and appropriate the requisite amount of the debt, owed by him to its payment. But unless A is a banker, or had funds in his hands belonging to B for the special purpose of meeting such a draft; in other words, if he was merely an ordinary debtor of B, he was not bound to accept the draft, and his debt having been liquidated and discharged by the trustee process, B has no cause of action against him.

3. I lend my horse to an irresponsible person to use. I demand him back after a few weeks, when he says he is not through with him yet. I am told that I cannot take possession then of my own property, but must wait his pleasure to give it up. If the man was responsible I could sue him for damages.

A. If the owner can recover possession of his horse without a breach of the peace he may do so, otherwise he will have to resort to a justice's summons. If a few day's loss of the animal's use will justify the expense, he may give bonds and compel the immediate delivery of the property, without waiting for the return day of the summons.

4. A being in business applies to C for a permanent loan, offering a stated share of profits in lieu of interest. Can C enter into such an arrangement without incurring liability as a general partner in the business? If no, could the liability be avoided by advertising the loan as at the risk of the business, or in any manner besides forming a special partnership?

A. A loan can be made at simple interest, and by agreement be subjected to the risk of the business without constituting the lender a partner. But an advance of capital, subject alike to the risks of the business and to a share in the profits, will be certain to involve the lender in the risks of the partnership beyond the limit of the loan. The special partnership act was passed expressly to meet this case.

MARRIAGE.

1. If I go to a hotel and register my own name (having a lady with me) and added, "and wife," can that lady claim me legally as her husband? Or if I should introduce her to any one saying "my wife," has she any legal claim upon me?

A. In this State marriage is a civil contract, and this contract is proved like any other bargain. Where no act of solemnization by a magistrate or a minister can be shown, then cohabitation as man and wife, and general reputation, are sufficient to establish the existence of the contract. Under the latter one of the strongest proofs has always been the acknowledgment by the husband of the wife as such in the presence of third parties. A man who should introduce a woman as his wife, and thus record her name in the register of a hotel where they passed as man and wife, if she should insist on her claim, could be held as her husband provided there were no other testimony bearing on the case.

2. Does not the revised statutes of the State of New York prohibit the contraction of marriages between first cousins?

A. There is no statute in this State on the subject, and such marriages are comparatively frequent. The physiological reasons commonly assigned are not sustained by satisfactory evidence, and we have no serious objections against such marriages.

3. Mr. A and Miss B fill out the blanks which Ministers are obliged to fill with the civil authorities, giving age, residence, parent's names, etc., and sign the same with their full names. Afterward these documents are exhibited to a third party, and the signatures acknowledged to be genuine. Can this be construed to be a legal marriage according to the laws and legal decisions of the State of New York?

A. In this State marriage is a civil contract, and a mutual agreement between competent parties to this effect is a legal marriage provided it can be proved. When this contract is made in private, the difficulty is to prove that the parties actually made such an agreement. The mere filling out of a blank return stating that A and B had been married, even if signed by the parties themselves, is not undeniable proof that they were thus married, or had made such a contract. It may have been filled up in jest, where no marriage contract existed. An actual contract of marriage signed by the parties before witnesses would be evidence; but the better way in all cases is to follow the usual customs of marriage before some responsible recognized authority, as a magistrate or clergyman.

4. Because priests are legally authorized to join people in wedlock in a country, such marriage being recognized in law without any further sanction in a civil court, is it therefore correct to say that "civil marriage is not necessary" in such a country? Who are the parties authorized to perform marriages in this country, and what rules of law are such parties compelled to conform to? Is it necessary for a minister of religion who performs a marriage, or is he legally bound to report the same to some civil authority?

A. Where marriage is not recognized as a civil contract, but as a religious sacrament to be celebrated only by a priest, it is proper to say that a civil marriage is not necessary. In this State, (N. Y.,) the following persons are legally authorized to solemnize marriages, for the purpose of being registered and authenticated, viz: Ministers of the gospel and priests of every denomination, mayors, recorders and aldermen of cities; judges of the county courts, and justices of the peace; and judges and

justices of courts of record. Jews and Quakers are allowed to marry according to the regulations of their respective societies. Marriage is declared in this State, (N. Y.,) to be a civil contract, and any such contract duly made in any form, is a legal marriage. Those who perform the marriage service in this city, are required to make a return to the registrar under a penalty.

MARRIED WOMEN.

(SEE ALSO HUSBAND AND WIFE.)

1. Can a wife dispose by will or otherwise, of real estate which had been previously conveyed to her by her husband? At her death, having failed to make a will, would the property revert to her husband or the children in equal proportion?

A. If there was a valid conveyance by the husband to the wife, the latter can dispose of the property, in part by will. If she dies intestate, the property will descend to the children in equal shares, after the husband's life estate as tenant by courtesy. This estate he will also possess, in spite of the will, the remainder being all that can be acted upon by the wife's testament.

2. Can a married woman, whose husband is alive, act under power of attorney, without interference from her husband, and receive dividends and interest under that power, solely and independently of him? Can her unmarried daughter, being of age, act in a similar manner under joint power with her mother? Is it absolutely necessary for a power of attorney to be recorded before it is acted on?

A. In the execution of a power it makes no difference whether a woman is married or single; her husband has nothing to do with it; and she may be joined with her daughter or any one else. If the power concerns real estate, or requires the execution of an instrument under seal, it should be recorded, otherwise such record is unnecessary.

3. Is a mortgage from a husband to a wife for actual money paid by her therefor, good as in other cases where the relation does not exist?

Can a wife who has real and personal property in her own right will it to other parties than her husband so that he has no right of dower?

A. Under the laws of New York, a married woman may thus contract with her husband, and sue him, the same as any other person, for breach.

The same radical married woman's acts enable her to will her real and personal property to whomsoever she may choose, and if she wills it away from her husband it defeats his rights as tenant by the courtesy, so that he has no interest in it. (*Halfeld v. Sneden*, 54 N. Y., 280.)

4. Is a woman's signature to a note or other obligation good, her property consisting of her one-third interest in real estate left her by her deceased husband?

A. If the signature was made during the husband's lifetime, it may not bind her separate estate, unless it was designed to benefit her own property. But a widow binds her property by her signature, precisely as a single man would, and to the same extent.

5. A being married, had no children; his wife had brother and sisters. A's wife took a brother's daughter and brought her up, and it is said adopted her. A, presuming he would die first, and anxious to leave his property to his wife, deeded his real estate and transferred his stocks to his wife. His wife died and left no will. A is still living, and has brothers and sisters living. A's wife, now deceased, held deeds for the real estate and the personal property, and left no will, who shall inherit the property?

A. If A's deed to his wife is without flaw, he will after her death, under the circumstances stated, have only a life estate in it, remainder for life to her father and mother if living, or either of them, remainder to her brothers and sisters. The hardship of such a descent, in the present case, would justify A in taking advice as to the validity of his deed. The personal property transferred to his wife goes back to him.

6. N. J.—I sold goods to W & B, receiving a note payable in 30 days at a bank in Jersey City. The note was signed by the mother of W, payable to the order of her husband, and indorsed by him and young W, also by B. The note was put into bank here for collection, and has come back protested. The signer of the note, Mrs. W, is wealthy; none of the indorsers have any property. Now can I enforce the payment of the note, Mrs. W being a married woman residing in Jersey City?

A. As a married woman in New Jersey cannot make herself liable for the debt or default of another, we fear that she could resist payment of the note in question, unless it had an existence as a valid obligation aside from the transaction above described.

MISCELLANEOUS.

1. How do you understand the law in reference to a widow who is in receipt of a life annuity payable annually and semi-annually? If she should die a month before either should be payable, would her legal representatives be entitled to a pro rata amount to the day of her death, to meet obligations incurred previously on the strength of that income?

A. The English rule is stated to be that "as an annuity is the grant of a sum of money payable at certain appointed times, although the annuitant generally dies in the interval between the times of payment, yet the law does not make any apportionment between the part of the period elapsed and that which is unexpired, but limits the payment to the last period completed before the death of the annuitant. This proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum at fixed days during the life of the annuitant; when the latter dies, such day not having arrived, the former is discharged from his obligation."—Lumley's Law of Annuities, 291. "A remarkable exception to the general rule," says the editor of Story's Equity Jurisprudence, 4th ed., sec. 480, note, "has been introduced in the instance of annuities for the maintenance of infants, or of married women living separate from their husbands." The point has not been decided in the New York courts, so far as we can ascertain, but in Pennsylvania it has been held that an annuity to support a wife or child for life is payable until death and is apportionable."—Fisher v. Fisher, Pa. L. J., p. 168. If apportionable, in the above case, the annuitant's representatives may recover a pro rata amount up to the time of her death. Whether so or not, however, appears to be an open question in New York, as a point of law. As a point in equity we give our opinion that a proportionate amount of the annuity should be paid.

2. We are owners of part of a first mortgage amounting to say \$250,000. A part of the bonds, say \$50,000, are held as collateral security, and on such bonds the coupons have not been paid by the company for five years, as the parties holding the collaterals have ample protection in the bonds, and also because the interest on the debt secured is paid at stated times as agreed. The bonds are deposited by

an individual party, and not by the company who issued them. Now as bondholders, we are allowing a debt to be rolled up against the property in the form of past due coupons, which may lessen our security in case it is found necessary to sell the property. Have we any rights by which we can force the past due coupons to be presented to the company for payment, and thus keep down the debt to the amount of the mortgage?

A. The owners of the deposited bonds could no doubt compel the collection of the coupons, but we doubt if an action could be maintained by any of the other bondholders, there being no privity between them and the bailees, and their interest in the question being too remote or uncertain. It might even appear that they will be likely to benefit by the delay, since in a year's time the collection of the coupons first due will be barred by the statute of limitation.

3. Does the law of the United States prescribe that every power of attorney executed in a foreign country must be accompanied by a consul's certificate? or is a foreign notary's seal sufficient?

A. There is no law of the United States on the subject. Where it is necessary to prove in the courts here the proper execution of a power in a foreign country, the certification of a United States consul under seal would be the readiest method of verifying it, but there is no statute requiring it.

4. What is the liability of an only son (in receipt of a good salary from a national bank) for his father's sustenance, his mother refusing it, at the same time holding and collecting rents from real estate, the title to which came to him from his said father; the mother harboring a son-in-law and family of no business, turns her husband adrift as *non compos mentis*. The question is, which could the law prevail against?

A. The law of this State, (N. Y.,) obliges children to the extent of their ability to contribute to the support of their parents, that they need not become a town charge. On application to the Overseers of the Poor, or in this city to the Commissioners of Charities, it is the duty of these officials to move the Court of General Sessions for an order requiring the son to contribute to his father's support, and fixing the sum which he must pay.

5. Can the State of Arkansas, after guaranteeing the first mortgage bonds of a Railroad Company of her State, be sued and judg-

ment obtained on the coupons of said bonds, and if there is any remedy?

A. The right of a private citizen to bring suit in the Federal courts against a State of the Union, was taken away by Article XI., adopted as an amendment of the Constitution of the United States.

6. Can water rates be legally collected from churches in New York State? Please enumerate the taxes, municipal and otherwise, for which the real estate of duly incorporated religious societies is liable.

A. It is provided by section 4, title 1, chapter 13, part 1 of the Revised Statutes, that "every building erected for the use of a college, incorporated academy or seminary of learning; every building for public worship; every school-house, court-house and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them, shall be exempt from taxation."

But, as said by the Supreme Court, Bronson J., in *Sharp v. Speir*, 4 Hill, 76, "our laws have made a plain distinction between *taxes*, which are burdens or charges imposed upon persons or property to raise money for public purposes, and *assessments* for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement." On this principle was the decision in the *matter of the Mayor of New York, &c., for the enlarging and improving a part of Nassau Street*, 11 John, 77, where the fancy of the reader is carried back many a year by the statement that the commissioners "assessed the benefit of the proposed improvement to the following churches, to be paid by them, viz.: on the French Church Du St. Esprit, \$1,273, the Presbyterian Church in Wall street \$1,981.81, and the Scotch Presbyterian Church in Cedar street \$410."

Water rates are not taxes, and though churches, unless it may be the Baptist, may not have as much use for water as other property, we think that on the principles above laid down they would be held liable to pay.

7. Suppose a firm has established a credit agency in one line of trade, to make investigations of buyers and receive a detailed state-

ment of their affairs in writing signed by them ; suppose there are five hundred subscribers or firms who pay the agency firm a certain sum per annum for information ; can a form of statement be drawn up so that statement thus made by debtors to the agency firm and received by the creditor if goods are delivered upon the strength of it, will be so binding that the creditor can hold the debtor criminally liable in case the statement was untrue ?

How long would the statement be binding ?

A. The English authorities give the right of action to third parties who are misled by false representations made by first to second party concerning his estate, and our own courts, where they have denied the right of third parties, have done it on grounds wholly wanting in the case described. Our opinion is that a customer would be bound by representations made to an agency expressly for the benefit of its subscribers.

Such a statement would have no continuing effect. If true when made, and the customer (without fraud) became insolvent the next day, he could not be impeached or prosecuted because of the sudden change in his affairs.

8. A person finds a sum of money in a public passage way of an institution, an insurance company, for instance. After careful advertising the owner fails to appear to claim the money. To whom does it belong (subject to claim by the loser, of course), the institution where the money was found or the finder ?

A. We frequently have cases like the above submitted to us for adjudication. The subject ought to be more thoroughly understood by the public. The finder of any property astray is bound to do what he can to seek the owner and return it to him ; but until the owner, or some one legally entitled to appear for him, is produced, the finder can hold it against the world. Before any one can question the title of the finder, he must have some color of title himself. It is very common for shopkeepers to insist that money found on the shop floor or in the passage way, shall be left with them until the owner is discovered. This case was tried in England, (*Bridges v. Hawsworth*, 7 Eng. Law and Eq. Rep., 424,) and decided that the finder who picked up the money from the floor had a title as discoverer against the shopkeeper, who did not pretend that the money was his own. The question has also been settled here (*McAvoy v. Medina*, 11 Allen, 548),

establishing the title of the finder against every one but the owner.

9. A changes for R a twenty-dollar bank note as an accommodation, giving him small bank notes therefor. Subsequently A is informed that the twenty-dollar note is counterfeit, and notifies R to redeem it. R hands him ten dollars on account, and a few days after calls for the twenty-dollar note, offering the balance, ten dollars. A then informed R that the twenty-dollar note had been stolen from him, and he is unable to return it, but demands the ten dollars balance due, claiming as the twenty-dollar note was counterfeit and worthless, that R suffers no loss by his not returning it. R not only refuses to pay the ten dollars balance, but demands from A the ten dollars already paid, claiming he could return the twenty-dollar note to the party from whom he received it. Can A collect the balance, ten dollars, from R, or, can R collect the ten dollars already paid A?

A. If the above statement can be substantiated in all its parts by the legal evidence, R can be compelled to pay the remaining ten dollars, and A is under no obligation, even if he had it, to return the worthless note. R can recover of the person who paid it to him in the same way.

10. We have an interesting question asked of us as to the liability of a hotel-keeper for the value of a trunk containing valuable clothing of a guest of his house, left in his care, under the following circumstances: the guest was for several days at the hotel in question (a first-class house); on going away the bill for the time there was made out and paid in full, but inasmuch as the guest was going to Canada with her children to leave them at school, and was intending to return to the hotel in a few weeks, she asked the office clerk in charge and to whom she paid her bill, if one of her trunks could remain at the hotel until she returned. He answered that it could remain with perfect safety, and it would be returned to her when she got back. On her return on her way homeward, she stopped at the hotel, asked for her trunk, and it could not be found. On inquiry, she found that the landlord or proprietor having recently sold out his interest in the hotel, had ordered all the so-called unreclaimed baggage to be sold at auction, and by mistake of some of the landlord's porters or employees her trunk had been sold, there being no charges against it whatever. On demand of the landlord for the return of the trunk and its contents intact and uninjured, he said he could not return it and would not pay for the value thereof, as he did not consider himself liable for any baggage left by permission in the hotel by any guest, after his bill was paid, even if the same had been sold "by mistake." He acknowledges that the trunk was sold by his orders, that is, he ordered all "unreclaimed baggage" to be sold, and his employees had no business to have taken the trunk in question up out of the baggage room where it

had been for several weeks. Still as it was done and was sold, why he is not liable. What is the law of New York on this subject?

A. If the guest had left for good, the landlord or proprietor would not be liable as an inn-keeper to the owner of the trunk. "The liability of an inn-keeper, as such, ceases when the guest pays his bill and leaves the house with the declared intention of not returning. The guest then leaves his baggage behind him at his own peril, and the inn-keeper is no longer responsible for it, unless it be committed to his charge, and then only as an ordinary bailee." N. Y. Sup. Court, *Wintermute v. Clarke*, 5 Sand., 242. Moreover, "an inn-keeper's clerk has no authority to bind the inn-keeper to liability for property delivered to him beyond the time that the owner remained at the inn; nor to agree to keep the property until the guest can send for it." Sup. Court, 1870, *Coykendall v. Eaton*, 40 How. Pr., 266; 42 How. Pr., 378. If the lady had departed with no promise of return, the hotel proprietor would only have been liable for gross negligence on the part of himself or servants, as in the case of an ordinary bailee without hire. Even in that case, however, he could be made liable for conversion of the property to his own use, or for its sale on his account. But the fact that the owner was to return to the hotel takes this case out of the above restrictions, and in our judgment makes the hotel proprietor liable as an inn-keeper for the entire value of the property.

11. Receiver's certificates that were stolen, were payable to bearer at 6 per cent. interest due at time they were given, i. e., there was no time specified to pay them in. Can we recover the certificates or their value from the parties that hold them or have held them. Would the party or parties that bought or sold them do so at their own peril, inasmuch as the certificates were due at the time they were stolen? Would they not come under the same head as a promissory note due at the time it was transferred, and be subject to all offsets by the parties that previously held it?

A. It is a general rule that the holder of negotiable paper in order to acquire a better title than that of the person from whom he received it, which in the case of a thief of course is none at all, must have become possessed of it before it is overdue. (Daniels on Negotiable Instruments, sec. 782.) But in respect to instruments payable at sight or on demand, they are not re-

garded as instantly overdue. "A reasonable time," says Parsons, "must elapse before non-payment dishonors the bill or note." In case of receiver's certificates, what would be such reasonable time would have to be decided by the court in view of all the circumstances surrounding the condition and business of the road. If such reasonable time had gone by when the stolen certificates were put in circulation by the thief, the buyer could not be considered a bona fide holder and would gain no title.

12. Assuming that a bridge over a stream would connect existing highways in adjoining towns, are the towns legally liable to build such bridge? Cite authorities.

A. We know of no express statutory provision on this point, but the language in the supreme court in the case of Beckwith v. Whalen, 5 Lans., 376, plainly intimates the opinion that under such circumstances both towns would be liable to join in building a bridge. The case cited occurred in Monroe county, where the highway commissioners of the town of Brighton commenced suit against the town of Penfield to compel it to contribute to the expense of a bridge across Irondequoit Creek. They were nonsuited, because though there was a highway on the Brighton side, there was none on the Penfield side. The court said: "No town is under any liability or obligation to build or maintain a bridge over any stream, *unless such stream intersects a highway.*" This is indeed only an incidental remark, but indicates the opinion of the court, in which we concur.

13. About two years ago a case of merchandise was received by us fully addressed with our name, street, and number. From whom it came we do not know. What is the proper course for us to pursue? Not wishing to store it longer have we a right to sell, and should the sale be made at public auction?

A. It should be advertised and sold at public vendue and the proceeds, over and above expenses, held for the rightful owner whenever he claims it.

14. By what rule, if any, is the line drawn between personal property and real estate, in the machinery and tools of a factory? Is all machinery not fastened to the floor personal property?

A. All that might be removed if the factory was leased is personal property; the rest belongs to the realty.

15. Please give the laws governing the notary's charges for protesting notes in this State, particularly anything relating to expenses beyond fee (75 cents), notices and postage.

A. The fees of notaries are regulated by chapter 356, laws of 1865. In addition to the fee of 75 cents which he is entitled to charge for a protest, including his seal, and a certificate when required in case of suit, he may demand ten cents for each notice not exceeding five, on each bill or notice protested. He can make no extra charge for postage when the notices are mailed.

16. We constantly receive as result of our advertising sample newspapers, often a number in succession, some of them for years. Many of these papers are undesirable and are not opened. I had previously received a bill which I returned saying that I had not subscribed for the paper. This is an aggressive method of creating a circulation which I do not feel like encouraging. What is my responsibility and duty in the matter?

A. The above is not a singular case. Many persons, we should say more than a dozen, have called upon us with a similar complaint. In each instance the history was the same. A new paper was started and a copy left at the door. In some cases it was taken in and read; in others it went into the waste basket without attention. In all, however, the receivers supposed that the publication was a gratuitous offering for their inspection. At the end of about ten weeks a bill for the year was rendered. Some paid it rather than to have any difficulty. Some paid it to date and stopped it. Some, and we may say most, refused to do anything about it, considering it an impertinent attempt to extort money from them. To these has been sent a note from a lawyer, the said note having been reproduced in fac simile by the chirographic, or hectographic process, which takes from one to two hundred copies, threatening suit unless payment is made.

There has been decisions, chiefly in the rural districts, establishing the right of a publisher to collect his subscription money from one who received his paper and had not ordered it stopped. In all these cases, as far as we can trace them, the publisher had sent the paper in good faith, supposing that the recipient was a bona fide subscriber. In most of them, the defendant had been a subscriber by his own order, and had simply designed to let his

subscription lapse without taking the trouble to inform the publishers of that desire.

In the cases now under consideration the receivers of the paper had never made any such contract, and had no idea that the paper was sent to them with any expectation of sending in a bill for it. There are many so called "Trade" papers that get considerable remunerative advertising by agreeing to circulate a given number of copies, and these are widely distributed without any attempt to charge for them. It was a reasonable inference, therefore, when a merchant received each week a copy of a publication for which he had not thought of subscribing that it was distributed gratuitously.

We cannot say what a District Court judge might decide before whom a case of this kind should come, but we are quite clear that the superior courts on the evidence now before us, would dismiss the claim as without reasonable foundation, if not utterly fraudulent. To imply a contract for subscription from the receipt of a few copies of a new publication thrown in at the door, or sent to the address of the house through the Post-office, at a time when such gratuitous distribution is too common to attract special attention, would in our judgment be a monstrous perversion of the legal principles upon which the plaintiffs seek to establish their claims. We advise every one threatened by this lawyer, to resist payment, and if actually sued, to defend, and establish the facts. If it is necessary to combine in this defense, application to us from any of our subscribers will secure such association for their protection.

17. A builds the house within four feet of his dividing line of lot, having side windows looking into his four feet passage. B, who owns the adjoining lot, builds to the extent of his line, putting in windows looking into A's lot or passage. Can A prevent B from placing windows where they overlook A's property, or compel him to close them up?

A. This point has not, so far as we know, been distinctly settled by the New Jersey courts, but it has been decided that ancient lights cannot be obstructed (*King v. Miller*, 4 Hal., ch. 559), and therefore unless A has the right now to inclose the windows in question, they will in time become ancient lights, and

he will be unable to build up to the line of his lot. Our belief is, therefore, as was done in a somewhat similar case by Grace Church in this city, A can build a wall, erect a high fence, or do any other act of that kind to prevent B's windows from overlooking his lot. Probably if the house is in course of construction he could obtain an injunction to prevent any windows opening on to his property.

18. Several of my neighbors owning adjoining houses in a row have a difference of opinion on the ownership of dividing fences, and the question arises, on whom rests the right to reset a fence in case it gets blown down?

A. In this city the ordinances require all division fences to be divided between the respective owners on either side where this can be done conveniently. When it cannot be thus divided, they require that the fence shall be made and kept in repair at the joint and equal expense of the owners of the land on each side. If any one whose duty it is to make or repair a fence shall neglect so to do, for six days after being requested in writing by the owner of the adjoining ground, the latter may make or repair the fence, and recover from the former the share he ought to pay. In case of any disagreement about division or other dispute the Aldermen and Common Councilmen of the district or ward have jurisdiction to determine the rights of the respective parties.

19. A steals from B a sum of money, and uses it to pay off a debt to C. Can B recover the stolen money from C, even though it is unquestionable that B identifies the money in C's possession as the money stolen from him?

A. Money and negotiable securities are excepted from the ordinary legal rules applying to stolen personal property, and the possession for value and in good faith, gives title.

20. A, from the country, buys a bill of goods from B, and orders C to send a small parcel to B to be packed and shipped by B, which C does. B's carman gets away with the goods instead of delivering them at the freight office. Is B liable to pay for the small parcel, or who is?

A. As B in this case was a mere bailee without compensation, he was bound only to use reasonable care, and if the cart-

man was a person apparently fit to be trusted with the goods, we do not believe B can be held responsible for their loss. As C obeyed A's directions, he cannot be required to replace the stolen merchandise; and therefore nobody can be looked to, save the delinquent cartman.

21. Does the fence of the yard on the right or left hand side of the house belong to the owner, who must consequently keep it in order? Or, is the half of the fence on both sides his property?

A. The law provides for dividing the line between two adjoining owners so that each shall construct a proper fence on his own part, if they so desire. Where this has not been done, they own the fence in common, and when it needs to be repaired or rebuilt, each can be compelled to bear his share of the burden on the proper legal notice. For the most part, each owner of a city lot has three neighbors, one on each hand and one in the rear, who share these relations with him.

22. What redress, if any, exists in the following case: Goods are manufactured for a party (transacting business as an incorporated company) who receives them, and when payment is demanded, some days afterward, fault is found with them, and a letter is written to the manufacturers charging them with swindling, and threatening exposure, etc. This letter purports to be from a company, and to be signed by it. To ascertain the name of the writer, a party goes to the office of the company, exhibits the letter to the person in charge, and inquires the name of the writer. Pretending to examine it, this person reaches over and snatches the letter, which he puts in his pocket and refuses to return, saying to the inquirer with a chuckle, "now find out who wrote it." It is believed that the person who seized the letter wrote it, using the company's name; and it is suspected that his anxiety to obtain possession of it was accelerated by discovering that he had, by making charges and using threats, made himself amenable to the law. Does the letter belong to the company over whose name it was sent? or to the actual writer? or to the party to whom it was sent? And what is the proper course to pursue?

A. The letter belongs to the person who received it and to whom it was addressed, and if not destroyed may be obtained by legal process. The young man who took it by force can be punished for that act.

23. How long can a party keep a removal sign on the premises after he vacates it. Is there no law that gives the right?

A. Except by the courtesy of the owner or new tenant, if one has come in, the outgoing tenant cannot keep a removal sign on the premises one hour after he has vacated them. He has no legal right to such an accommodation.

24. About September 1st I took board and lodging and I stated particularly that I did not want to take board by the season, and there was nothing more said about it at the time. I should like to leave now, but the proprietor holds me responsible if I do so. When I take board by the season in September when does the season expire?

A. The season is supposed to last six or eight months, but this game of the boarding house keeper threatening to sue if the boarder leaves during the season is an old bullying dodge. If no engagement was made for any length of time, and no contract was expressed or fairly implied that the board was taken for "the season" the boarder can leave at any time, paying to the end of the week if by the week, or the month, if by the month, and should despise the threats of the "proprietor."

25. State the law relative to selling lottery tickets, as well as buying the same in the State of New York?

A. The sale of lottery tickets is forbidden in this State, (N. Y.,) the seller being punishable by fine and imprisonment. The purchaser may sue for, and recover twice the amount he has paid. The advertisement of lotteries is illegal, and expressly prohibited by statute.

26. A gentleman left notice that I shall serve on jury, with my servant, who forgot to deliver or mention the same to me. Can the courts hold me responsible and fine me?

A. "Citizen" is liable to a fine, the service of the notice having been in accordance with the legal requirement. When servants are neglectful of their duty, the master is the one to suffer.

27. Can suit be entered in United States Circuit Court, Baltimore, Md., by a merchant in this city against a party in another State, say Georgia, North Carolina, Texas, or any of the Eastern or Western States, and notice thereof being served by sending a deputy to the party, or mailing the same to him to his regular post-office? If so, and judgment be obtained, can defendant avail himself of any State laws where he resides?

A. A suit could not be brought in the Circuit Court in that

district against a citizen residing in another district, and he be compelled to answer on a notice sent to him by a deputy marshal.

28. Can a State which has purchased from its own citizens the bonds of a repudiating State, compel payment of them by a suit in the Federal courts?

A. The jurisdiction of the Federal courts, in suits between States, has been a subject of keen controversy, but it nevertheless exists, and the Constitution does not expressly limit it to political questions. On the contrary, the language of that instrument, article 3, defining the judicial power, declares that it extends, generally, "to controversies between two or more States." Why may not such a controversy arise on contract? It has been suggested as an objection that the law has prescribed no execution against a State. Attorney General Randolph, in the celebrated case of *Crisholm v. Georgia*, 2 Dall. R., 419, answered this point by saying that the Supreme Court has power to decree the form and mode of execution. He also argued that the action of *assumpsit* would lie against a State. The majority of the court coincided with the opinion of the Attorney-General, and ordered that unless the State of Georgia appeared in due form, or showed cause to the contrary, judgment by default be entered. This was a case in which the suit was by a citizen of one State against another State, and the decision created such alarm that a constitutional amendment was adopted, taking away the power of a citizen to sue a State. But the amendment left the clause regarding controversies between States untouched; and the same reasoning by which the court came to the conclusion that a State was suable on contract, under the Constitution as it then stood, applies to the question whether it is suable in the same form of action, by parties who have an undisputed right to claim the process of the court. It is probable that an attempt to enforce the collection of repudiated State bonds in this manner would arouse fierce opposition, and that all the resources of learning and argument would be brought to bear to defeat the effort. Under such circumstances it would seem presumptuous to undertake to forecast the result, at least without a profounder study of the question than we have time to give.

Our impressions are, however, that in a case where the plaintiff State is the legal assignee of a debt owed by another, it might command the process of the Federal court to enforce collection.

The Federal court has adjudicated in regard to State boundaries in a suit between States, and this is as much a material issue as the payment of a debt.

29. Safe was blown open and robbed six years ago of money, railroad and town bonds, bonds and mortgages, notes, etc. The loss was thoroughly advertised at the time, and printed slips giving the numbers of the bonds and amount of each bond were put in most of the New York banks and brokers offices, and sent to all the prominent cities in the United States. This same Otis that has been on trial last week for theft in the Canada money matter, has commenced suit in the United States court to collect the past due coupons, payment of which has been refused. This Otis claims that he purchased the bonds in London, England, and claims to have a bill of sale. These bonds have no market value outside of this immediate neighborhood. Could any other party become an innocent holder of these bonds from such a character as this Otis? Could we attach these coupons when presented for payment as our property as being stolen?

A. If the stolen securities were negotiable, and came into the hands of the present holder in good faith, for valuable consideration, they cannot be reclaimed by the former owner; but the circumstances of the above case are sufficient, in our judgment, to justify legal proceedings to test the bona fides of the present holder's possession. In such an action, the coupons or other securities can be attached.

30. The rooms of Miss W., a dressmaker, were broken into during her absence, and dresses and materials belonging to her customers were stolen. Is she liable for the value of the goods?

A. If Miss W. has used due diligence in the care of the property intrusted to her, she is no more liable to the owners for property stolen than for property destroyed by fire, or injured by an earthquake. All establishments whose owners are able, do make good these losses, as far as we know, for the sake of their own interest, but if they have been guilty of no negligence they are not legally obliged to do it.

31. State if 12 per cent. tare is or is not the usual tare on raw sugars?

A. The tare on hogsheads of sugar here was formerly 12 per cent., and is still so reckoned, we believe in some Cuban ports. By regulation of the Secretary of the Treasury, under date of May 22, 1879, the following rates were established at this port, and this is now the custom of the trade :

Sugar in tierces and hogsheads.....	actual tare.
Sugar in boxes.....	14 per cent.
Sugar in barrels.....	10 per cent.
Sugar in mats and Pernam. bags.....	2 per cent.
Sugar in other bags.....	1½ per cent.
Melado.....	9 per cent.
Irregular packages.....	actual tare.

32. S buys several acres of land in a valley of the Adirondacks, and enters into a contract with C for the building of a summer cottage. In procuring stone for the foundation of the cottage one of C's workmen discovers beneath the earth a piece of ancient Indian pottery—a well-preserved jar. The workman breaks the jar in pieces and distributes it among his co-laborers. One of the old inhabitants of the valley, hearing of this and becoming much interested in the discovery, succeeds in collecting from the laborers the various scraps, puts them together with cement, and in a fashion restores the jar to its original shape. Upon ascertaining what had taken place, S "interviews" the old inhabitant and lays claim to the relic on the ground that it was found upon his (S's) land. The old inhabitant disputes the claim, asserting that when S bought the land he bought only what "nature" had placed upon it and in it. This state of facts suggests the inquiry :

Is the Indian jar in question "treasure-trove," and, if so, does it, under the laws of New York, belong to the finder, to the owner of the land, or to the State ?

If is not "treasure-trove," what sort of property is it, and to whom does it rightfully belong ?

A. All mines of gold and silver discovered within this State are declared by law to be the property of the people, and the same is the case as to all mines of other metals on lands owned by aliens, as well as mines of other metals, of a certain grade in value, discovered upon the lands of citizens. And "all mines, and all *minerals and fossils* discovered, or hereafter to be discovered, upon any lands belonging to the people of this State, are and shall be the property of the people." (New York Revised Statutes, part 1, title xi. chap. ix.) We know of no reservation to the people of the right of property in fossils or ancient remains found on the lands of private owners, and do not believe

that any such exists. The jar in question, therefore, clearly belongs to the owner of the land. It may be classed as abandoned personal property, which is not, however, the property of the first finder, when embedded in the soil of another man's land.

33. Is there any law compelling banks to stamp the word "counterfeit" over all counterfeit bills presented to them by depositors?

A. We find that the provision which requires all United States officers charged with the receipt or disbursement of public money to stamp counterfeit bills offered them, was in 1876 extended to all officers of national banks. The law declares that they "shall stamp or write in plain letters the word 'counterfeit,' 'altered,' or 'worthless,' upon all fraudulent notes issued in the form of and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongly stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof."

34. I had a piece of land laid out in lots, and a map made of the same, from which I sold two of the lots to a party who now claims that the sale was illegal in consequence of the street fronting the lots not being graded, and the fence taken down. The question is, what constitutes a highway?

A. To constitute a highway in such a case there must be not only a dedication by the owner, irrevocable on his part, but an acceptance of the road as and for a highway, by the proper town or city authorities. If the road is still fenced against the public, that fact, in the absence of more positive evidence of a dedication, would go to show that it had not been dedicated irrevocably; and if in addition the road has been neither formally accepted by the municipal authority, nor worked by such authority as a highway, we doubt if it would answer the legal requirement. And the misdescription of the lots sold, under such circumstances, we have little doubt would entitle the buyer to rescind his bargain.

35. I telegraph to my broker on 16th June, "Buy 40 Eureka Cons. at nineteen." His bill dated 18th June comes to me as follows: "40 Eureka Cons. 19, \$760; commission $\frac{1}{2}$, \$5; \$765." On such a transaction am I not clearly entitled to the dividend of 50 cents, payable 19th June on above 40 shares?

A. If the transfer books were open when the stock was bought, the stock should have been transferred to the purchaser, and no one but he could draw the dividend. If the books were closed preparatory to the dividend, the stock could not be transferred, and the dividend would be payable to the one who owned the stock at the date of closing. The buyer could not claim it except under a special agreement.

36. In January a dividend of 10 per cent. on the stock of a company was declared, payable 5 per cent. on February first, and 5 per cent. on April first. After the payment of the first dividend a stockholder sells his stock before the second dividend is due. Is the seller or the buyer entitled to the second dividend?

A. The legal title of a dividend is in the person who owns the stock and hold it in his name when the same is declared. In sales and delivery of stock between the date of declaration and payment, it is very common that some arrangement is made by which the dividend shall accrue to the purchaser, but if this is not done it can be collected by the one in whose name it stands when the books are closed, and the buyer has no legal claim to it.

37. I had subscribed to a book to be delivered monthly. The first book was delivered July 1, and I have seen none since until to-day, when I refused to take it. Is the contract signed by me binding on me or not, to take the remaining 60 numbers?

A. The delivery having been interrupted, we think the subscriber is not legally bound to continue his receipts and payments.

38. We wish to sue a party in Massachusetts for a bill of goods. Can we have the case brought to trial in New York city, and if so, what court?

A. Our courts will not render judgment against a non-resident of the State, unless he has property within the State. In that case the action may be commenced in the Supreme or any of the Superior courts.

39. PA.—I am the owner of two pews in a church; the church trustees have taken all the interior of the church out, and remodeled entirely the inside; I demand certificate for my pews; they say they don't sell any pews. The trustees took the responsibility of removing

my pews without my consent. Are they not bound to give me a certificate for my pews in the church as well located as those I held before the alteration, or pay me for them?

A. The property of a holder in his pew is generally usufructuary only, or a mere easement. The trustees may destroy the pew altogether, as in the above case, and then are not bound, so far as any actual decision goes, to give the owner another in its place; but in Massachusetts it has been decided, and in Pennsylvania intimated, that the pewholder must be indemnified for his loss. (*Curry v. the Trustees, etc.*, 2 Pittsbury Rep., 40).

40. S. C.—Smith sells Jones a farm for \$30,000 on bond and mortgage, payable in ten annual installments. At the end of ten years Jones has barely paid interest. Smith then borrows from Davis \$10,000, and gives his bond with two securities, Jones being one of them.

Five years afterward Smith becomes involved and judgments are obtained against him. He begins a suit to foreclose Jones's mortgage, and about the same time Davis sues him and Jones his surety. Both suits abate by the death of Smith, and Smith's executor revives the suit of foreclosure. But Davis does not sue, as Smith's estate is insolvent and judgment creditors will absorb the proceeds of the land if Smith's executor succeeded in his foreclosure and Jones was notoriously insolvent.

The suit continues five years, Jones having pleaded default in title and payment, when Jones amends his answer and says his son has bought Davis's bond and refuses to say what he gave for it, and he that day had given his son his note for \$10,000 for the bond and claims the Davis bond and interest as a set off, which with other payments cancels the bond to Smith.

Please observe that Jones comes in possession of the Davis bond five years after death of Smith and after suit brought. Also, that executors by law are required to pay judgments before other debts.

Is this a case of mutual credits between Smith and Jones?

If so, can Jones set it up to the detriment of judgment creditors?

If Jones is entitled to the set off, what ought the amount of set off be? The bona fide sum his son paid for it? The \$10,000 expressed in the note he gave his son, or the whole amount of the Davis bond and interest?

A. Under the Revised Statutes of South Carolina, a counter claim or set off must either arise out of the contract or transaction which is the foundation of the plaintiff's action, or in an action arising on contract may be any other cause of action also arising on contract, existing at the commencement of the action. (Revised Statutes of South Carolina, section 172.) In the case

above stated the set off answers neither of these descriptions, and we think will not be allowed, to any amount whatever.

MORTGAGES

CHATTEL.

1. Can a chattel mortgage cover a constantly changing stock of merchandise? or, in other words, if we ship a bill of goods to a merchant who has a chattel mortgage on his stock, are they mortgaged when they reach his store?

A. The lien of a chattel mortgage purporting to embrace both the stock of goods the mortgagor then had in his store, and those he might thereafter acquire and bring into it, extends only to the stock in the store when the lien was created, and to such as may have been purchased and paid for from the proceeds of the same. It is not a lien as against other creditors for goods not thus included.

2. If a chattel mortgage is not renewed or recorded at the expiration of one year from its date, how are the parties to it and the property affected? Suppose the mortgagor sells the property after the year has expired and before renewal, how is the mortgagee affected? How must such mortgage be foreclosed, and when?

A. The mortgage need not be foreclosed, but within 30 days next preceding the expiration of the said term of one year, the holder must file a copy with a statement of his interest in the mortgaged property, or it is not a security against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith.

3. Will you advise me as to the proper method of canceling a chattel mortgage, the obligation having been paid?

A. If the mortgage was recorded, a satisfaction piece acknowledging payment may be executed and recorded. But a surrender of the mortgage with a receipt in full upon it, would doubtless be sufficient.

4. A borrows \$200 of B, giving chattel mortgage therefor, duly recorded. B is a notary and takes A's acknowledgment to the chattel mortgage which is in favor of B's wife. Since the mortgage was given A has sold some of the articles mortgaged, but has paid nothing to B on account of his \$200. As the 11 months are nearly expired

will B be safe in merely filing a certificate by his wife, that the \$200 is still due and unpaid? Does B's acknowledging the execution affect the validity of the lien on the chattels pledged; and if so, would it be preferable for B to require A to execute a new mortgage, to file in lieu of the one now recorded, and could A pledge chattels conveyed in the first instance, some of which he has since sold and received part payment for them, and retained the proceeds?

A. If A has sold some of the property covered by the mortgage, with intent to defraud the mortgagee, he has rendered himself liable to fine and imprisonment, and had better scratch around and pay that debt as soon as may be! If the existing mortgage were invalid, however, for want of being properly executed, a new one could not be made to cover the chattels sold and passed out of A's possession. But B could as well take A's acknowledgment as that of any body else, and unless the mortgagee chooses to take possession, he has simply to refile a copy of the mortgage, with a statement of his interest in the property claimed, 30 days before the year expires.

5. Was there ever any law of this State, (N. Y.,) or any decision rendered by the Court of Appeals, making it unnecessary to refile a chattel mortgage, under the following circumstances: A bought out B on the first day of January, 1870, giving ten notes of \$1,500 each in payment; one note coming due at the end of the year, the second in two years, and so on, the last being due January 1, 1880. To secure payment of the notes a chattel mortgage was given on the goods bought, which mortgage was duly filed, and in 1871 was refiled. In 1871, the person whose duty it was to attend to the matter, was advised by counsel that it was unnecessary to refile it as a law had been recently passed, or a decision made by the Court of Appeals to that effect.

A. We know of no such law or Court of Appeals decision. There was a New York Superior Court decision in 1872 (*Porter v. Parmly*, 43 How. Pr. Rep., 455), which held that after default and change of possession it was unnecessary to refile the mortgage. But the change of possession was constructive merely, and the Court of Appeals, holding that the mortgage had not in reality acquired possession of the chattels, reversed the judgment of the Superior Court. It is quite possible that this revised decision, which stood until 1878, is the one referred to, though it does not fully answer the description.

6. Please inform me whether a chattel mortgage to secure payment of a note on demand holds good? It is on stock of a harness maker,

and covers so many sets of single and double harness, blankets, whips, horse boots, etc., and the privilege is given the party (verbally) to sell any of the above and hand the proceeds to the mortgagee or to replace the same articles should he sell any.

A. The fact that the note is on demand would make no difference with the security if it were properly drawn and recorded. But a chattel mortgage on property left in the hands of the mortgagor, which he has the right to sell or change at pleasure, is not a safe reliance, as it would not hold against a third party who had lawfully acquired any of the mortgaged assets.

7. A merchant gives a chattel mortgage on his stock of goods to secure the payment of certain promissory notes not yet due. It contains a provision that if an execution, warrant of attachment, or other legal processes be issued before the maturity of said notes against the mortgagor, it shall be lawful for the mortgagee to foreclose at once. The schedule of such mortgage does not specify the quantities of the articles mortgaged, but simply says "teas, coffees, sugars, spices," etc., etc. Is such mortgage valid against a judgment creditor?

A. The clause of the mortgage permitting foreclosure before the due date would not of itself invalidate it if it were good in other respects. But the mortgagee of a stock of goods, which the mortgagor retains possession of and sells, applying the money to his own use, and not as agent of the mortgagee, applying the proceeds on the debt, is invalid against creditors. (*Edgell v. Hart*, New York, 213; *Conkling v. Shelley*, 28 New York, 360; *Russel v. Winne*, 37 New York, 591.)

8. *Mass.*—Is it necessary to record a chattel mortgage on furniture in the State of Massachusetts, and must it be renewed every year as in the State of New York?

A. Chattel mortgages in Massachusetts must be recorded in the city or town where the mortgagor resides when the mortgage is made, also in the city or town where he then transacts his business, or follows his trade or calling. If the mortgagor resides without the State the mortgage must be recorded in the city or town where the property is. Annual renewal is not required.

REAL AND MISCELLANEOUS.

9. I bought a mortgage of B, interest payable semi-annually. I also executed an agreement concurrent therewith, but not forming a

part of the assignment, whereby I obligated myself to sell the mortgage back (resign it) to B within one year at a price, if he should elect to tender the said price. It was the contemplation of both parties that the interest on the mortgage would be paid. Default has been made in the interest, and I am obliged to foreclose in order to establish my rights and secure an income. Does, or does not such foreclosure, so made a necessity devolving on me, extinguish B's right speaking of it as equity, under the agreement above mentioned to come in before the end of the year, and demand a reassignment of the mortgage, provided I give him proper notice of the circumstances, and of the steps which I am obliged to take?

A. Foreclosure of the mortgage by "Justitia" would put it beyond his power to fulfill his agreement for a reconveyance, and if B, therefore, offers the agreed price, with the defaulted interest, we think he is equitably entitled to the security, though the year has not expired.

10. Supposing I lend a friend fifteen hundred dollars on bond and mortgage for five years, and I give it to him on September 12, 1873, when does it become due? My reason for asking is this: he went to a Commissioner of Deeds and had the papers made out himself and they made it due October 19, 1878. I think it should be due on the 12th of September.

A. The date of the bond governs the maturity. A man may lend money on the 12th of September, but if he accepts for it a bond dated more than a month later promising payment in five years, the money is not due until five years from the date of the bond.

11. Can the holder of a mortgage on which compound interest has been paid foreclose if mortgagor sets up a defense of usury?

A. The payment of compound interest cannot be legally enforced, but it is not usury to receive it, if the debtor is willing to pay it, and such a transaction does not vitiate the obligation.

12. A B mortgages certain property to bank to secure loan of \$4,000; also deposits with bank a policy on same premises for \$4,000, loss if any payable to mortgagee.

The insurance company agree with bank that no act of A B shall invalidate policy in bank's hands, and that in event of loss, they will pay bank, although denying liability on policy to A B; bank agrees that on such payment, the insurance company shall be subrogated to all bank's rights as mortgagee, under all the securities held as collateral to the mortgage debt, to the extent of such payment, or at its option,

may pay bank the principal and interest due on bond and mortgage and shall thereupon receive a full assignment of the bond and mortgage and all other securities held as collateral to the mortgagee debt.

A total loss occurs ; the insurance company claims that the act of the assured has invalidated the policy and tender to bank the full amount due on bond and mortgage, viz. : \$4,000 and interest, and demands assignment of bond and mortgage and also a policy to a trustee to be held until the rights of all parties shall be determined, the latter, as included in and constituting one of the "other securities held as collateral to the mortgage debt."

Bank offers assignment of bond and mortgage, but refuses to deliver policy on the ground that it, the policy, belongs to A B, the mortgagor.

Under the above facts, is or is not the insurance company entitled to have the policy assigned with the mortgage ?

A. If the policy is invalid as to the mortgagor, the insurance company appears to us to stand in the exact position of a purchaser of the mortgage, the money paid on the policy representing the purchase money. In this view of the case, it does not need any assignment of the policy, as it in that case would represent no right of action, and would be simply waste paper. On the other hand, if the policy was good in favor of the mortgagor, at the date of the loss, no assignment by the bank could take away his right to have the insurance money applied in satisfaction of the mortgage ; and being terms payable to the mortgagee he could make no other use of it. So that such an assignment could amount to nothing in either event, and the mere possession of the policy is a matter of not much greater consequence. The insurance company, however, in our opinion, has the *prima facie* right to it. The insurance company, having the mortgage assigned, will of course undertake to enforce its supposed rights by foreclosure, and in that action the rights of all parties can be determined.

13. I hold bond and mortgage, the principal of which fell due on May 1, 1879. There was a verbal understanding that it should remain unpaid for a year or two, provided the semi-annual interest be promptly paid. The rate written on the bond is 7 per cent. per annum. Do I jeopardize the principal by collecting interest at that rate ?

A. If the verbal understanding was such an agreement that the mortgagor could not be compelled to pay it on demand, the 7 per cent. rate may be exacted to the close of the promised for-

bearance. But if the mortgage is subject to foreclosure at any time, at the will of the mortgagee, only 6 per cent. can be exacted. If the debtor should voluntarily tender the 7 per cent. it would not be usury to accept it.

14. A bought a piece of property from B, paying no money but giving bond and mortgage on said piece of property, for the full amount of purchase money, or, as A told me, he gave a mortgage on this piece of land for amount of purchase money, and a bond to secure payment of mortgage, covering all of his real and personal property. This occurred about four years ago. About two years ago I purchased from A, a piece of land—not a portion of the land which was mortgaged, but of his other property—on his representation that it was free from all incumbrances. I having a knowledge of the existence of this deed, spoke about it, and he told me it had no effect on the property I bought, as no steps had been taken toward a foreclosure of the mortgage, upon which he had paid nothing since it was given, not even interest, nor had any suit been commenced upon bond, and that he would guarantee me against any loss or trouble. He gave me a deed for my property, I paying him in full for the same, and at once had my deed recorded. B told me that his lawyer informed him that if on levying on A's property under bond, there was not sufficient to pay his claim in full, he could go back of my deed and take my land to apply on his claim.

What I want to know then is, whether this statement of B's is correct, and my title to the land is contingent upon the payment of this mortgage? Must I lose all that I have paid to A, that is, the full value of the land, if this is so? Because B having deprived him of everything, he (A) has nothing to pay my debt with.

A. The question here is purely one of fact, to be ascertained by examination of the record of mortgages in the county where the lands are situated. If the so-called bond, said to cover all of A's real and personal property, was in fact a mortgage on the land afterward bought by our correspondent it will so appear on the record, and cannot be escaped. But if the paper is correctly described as a bond, it is not likely to be so made as to constitute a lien on real estate. The only way to ascertain is to have what should have been had in the first place, a search of title. If it proves true that the land is covered by the lien, and A is bankrupt, we do not see but our correspondent must lose all.

15. Some 30 years ago A sold a life interest to B for \$100 per year, B giving a mortgage on valuable property as security for pay-

ment of same. B or his heirs never paid the yearly interest, nor was it ever demanded. What claim will A's heirs have on the property? The mortgage never was foreclosed; is it outlawed? Should an amount be inserted in the mortgage as penalty for non-fulfillment of contract, and no steps ever taken to secure either interest or penalty, would that also be outlawed?

A. If there has been payment of neither interest nor principal, nor other acknowledgment of a subsisting obligation by B, within 20 years, the mortgage is outlawed, and the clause providing a penalty is no more collectible than the rest of it.

16. Can the holder of a second mortgage avail himself of the defense of usury in an action brought to foreclose the first mortgage, on which the borrower had paid a bonus?

A. A mortgage founded on usurious consideration is utterly void against all the other parties having liens on the property. 5 Den., 236; N. Y. Court of Appeals, *Thompson v. Van Vechten*, 27 N. Y., 568, and many others.

17. 1. When a mortgage is given for a certain lot of land, are the buildings situated thereon liable whether mentioned or not in the mortgage?

2. Are buildings erected on lands after a mortgage has been given for the land liable for the mortgage?

3. When a mortgage is taken on a lot on which buildings are standing, is it a matter of bargain as to the insurance on the buildings, or is it incumbent upon the party issuing the mortgage to insure? Some of the printed forms of mortgages have the insurance clause in, while others have not. Is there any law on the subject where the land without the buildings is not sufficient to cover the mortgage?

A. The word "land," as used in legal instruments, generally covers everything on the land, and a mortgage would, therefore, attach upon all buildings, erected either before or after the date of the mortgage, unless they should be of the class which the law permits, for trade purposes, to be considered as separate from the freehold, and removable by the tenant. For example, a mill built upon leased and mortgaged premises by the lessee, and owned by him, would not come under a mortgage given by the lessor. What constitutes such a trade fixture, however, is often a nice question, solvable only by a court.

The insurance of mortgaged property is a matter of bargain between the parties. Either party may issue, but the mortgagee

cannot charge the premium to the mortgagor, unless by agreement.

18. Four years since I loaned the trustees of a church in this place a sum of money to pay their indebtedness, taking a bond and mortgage upon their church lot, the church having previously burned down. Said note or bond was signed by all the trustees of the church. But since, it transpires that the trustees have no assets belonging to the church. Neither do they intend to rebuild upon said lots.

No part of the principal or interest has been paid. Are the trustees individually responsible for the payment of the balance of the mortgage, provided the church lot does not bring enough to satisfy the debt?

A. If the mortgage was duly authorized and properly executed by the trustees as such, and the bond was signed by them in their corporate capacity, they are not personally liable. But if the note is signed by the trustees as individuals, they are personally liable, although the mortgage is executed in the name of the church.

19. A holds mortgage on B's place for full value of property, and there are judgments recorded against B. If A buys the place of B at private sale for amount of mortgage and interest, is he holden for the judgment?

A. A would not be personally liable to pay the judgments, under the circumstances stated, but the equity of redemption in the mortgaged premises would remain subject to the judgment lien, and A would not be able to give an unclouded title without foreclosure.

20. I sell some land in New Jersey; they agree to erect a building, and I agree to make a loan when I give a deed, to take a mortgage for land and loan for five years. Could parties put a lien on the building that would take precedence of said mortgage? What I particularly want to know is whether my mortgage would come in ahead of any lien?

A. No, the builder's lien would have to be satisfied before the mortgage as far as the building was concerned.

21. A holds a mortgage against B's property, and when the interest becomes due, B fails to pay the same. Can A upon not receiving his interest ask the court to appoint a receiver at once to collect rents from B's property, or must A wait till foreclosure proceedings are instituted? How long does it take for foreclosure proceedings?

A. If the mortgage does not contain a clause making it due and payable on default in payment of interest, as we infer it does not, from the omission to mention the fact, the creditor cannot foreclose, and his remedy is a suit for the defaulted interest, and then if execution is returned unsatisfied, the appointment of a receiver may be obtained.

The shortest time in which a sale can be made in foreclosure proceedings, is about 50 days, but various contingencies may lengthen it so as to make the estimate of no value.

22. A bids off a farm at auction for \$1,200. B agrees to loan him \$700 and take a mortgage on the farm. A gets disappointed and can only raise \$300 to pay on it. B says he won't take a mortgage on it for more than \$700, but he will take the deed for the place in his own name, and will sell it to A for \$1,300 (i. e., a bonus of \$100). A paying B \$300, and B gives A a contract for \$900 payable in payments of \$100 yearly and interest. A pays the interest for two years, gets indebted to C, assigns the contract to C by request of C. B gives a deed to A, and A gives C a mortgage on the premises for \$1,200. About six months later B buys the mortgage of C paying him in full for same. Is or was there any usury in the transaction? Or, can a judgment creditor, or second mortgagee set up a legal claim of usury as against the holder of the first mortgage?

A. We cannot perceive any taint of usury in the mortgage by A to C, and as that is the only point now open to attack, we do not think a judgment creditor of A, or a second mortgagee, could set up the plea.

MORTGAGEE.

23. A gives B a mortgage on real estate for \$5,000, to run five years. In course of time B dies, and one of his heirs, C, becomes possessed of this mortgage. At the end of five years inquiry is made of C if it is necessary to take up the mortgage, who replies in the negative. The mortgage then runs along for a term of years and interest has always been paid promptly. Can C call in the money due on this mortgage suddenly, and in case of failure to pay, foreclose and sell out property? Must he not give reasonable timely notice? Can such a mortgage be foreclosed when interest is regularly paid?

A. There is nothing to prevent the immediate foreclosure of the mortgage. The holder has only to demand the money, and to commence proceedings if it is not paid. These proceedings are not as summary as an ejectment for non-payment of rent, and the owner of the property, if it is a good security for the

amount, can usually replace the loan before any serious costs have been made, even if no extra time is given by the leniency of the mortgagee.

24. We took a deed for a piece of property in this State on which was a small mortgage, which had been paid but not canceled, the mortgagee refusing to give a satisfaction piece without being paid some \$10 or \$20. This was about eight years since. We have this mortgage, but the mortgagee holds the former owner's bond. He has not demanded principal nor interest in all this time. Is he debarred by statute in this State from proceeding against the property? The mortgagee moved out of the State five years ago.

A. The mortgagee can be compelled to execute a satisfaction piece to clear the title to the land. He could "proceed against the property," but the facts being proved could recover nothing, and must pay the costs.

25. I purchased a house and lot in this city subject to a mortgage, and I am now requested to pay the same, the mortgage being due. Now since I came into possession of the property I learned from the former owner that the mortgagee received several hundred dollars bonus.

Can I refuse payment of said mortgage on the plea of usury, or have I a right when settling said mortgage to deduct the amount paid as bonus with interest from date of the mortgage?

A. A mortgage for money lent is an honest debt, even if the mortgagee did receive a bonus for lending the money. No one but a rogue will plead usury to evade payment, and our correspondent as an honest man cannot do it, even though the law permit it. If a man would not pay an honest debt unless the law compelled him to do it, he would steal if there was no law to punish it. Our friend we are sure will not place himself in such a list. We know of no case in this State where a man has pleaded the usury law to evade payment of a mortgage, except with the view of defrauding his creditor of his just dues.

26. Certain premises are mortgaged. On them is a mill, insured, and policy held by mortgagor. The mill burns and the vacant premises are not worth the mortgage debt. Has the mortgagee a lien on the insurance money, and if so by what means can he enforce it?

A. The mortgagee has no lien on the insurance money in such a case. He should have had an assignment of the policy at the time of taking the mortgage.

27. A borrows from B \$7,500 on mortgage and receipts for the money in two installments, \$2,000 and \$5,500. Prior to paying over the last amount, B learns that there are judgments and levies against A of which he was ignorant, A having assured him that everything was as straight as a string. This necessitated a visit by B to the town where A resided (as his place of business was some 400 miles distant), where he paid off the judgments and liens and took the mortgage for \$7,500. Before the maturity of the mortgage B dies, but leaves this mortgage with other property in the hands of trustees a life interest to one of his children, and at his death to his (B's) grandchildren. After B's death, of which A had notice, he continues to pay interest and made an offer to pay half of the mortgage before its maturity, to save interest, which the trustees declined. The mortgage has now matured, but A claims that if the property is sold it will not bring half of its value, and that if the trustees force the matter he will plead usury, claiming that he paid B a sum of money which was B's expenses. The trustees find an entry of the transaction on B's books, as follows :

May 15—To cash advanced A.....	\$2,000
June 4—To cash advanced A.....	5,200
To expenses incurred by visiting the town of——	300

A's letters show that there was misrepresentation, and that it was absolutely necessary for B to revisit A's place of residence to pay off claims before letting A have the balance. The trustees have a thoroughly responsible party whom B informed that he regretted letting A have the \$2,000, and to save the sum he had to go in \$5,500 deeper. Now has not A barred his right to raise the plea of usury against the present holders of the mortgage? Had B the right to charge a round sum for his expenses to and from A's place of residence? The transaction was made in New York. Please give authorities.

A. The expenses of a creditor's journey to meet the debtor for the purpose of making settlement were included in a new security for the debt, and were held in the case of *Harger v. McCullough*, 2 Denio, 119, not to render the security usurious. So, where the creditor's expenses in traveling to examine property at a distance were included, the same conclusion was reached in *Lynde v. Staats*, 1 N. Y. Leg. Obs., 89. The same was said as to expenses of searching title, in *Eldridge v. Ree*, 2 Sweeny, 155. Other similar expenses were allowed in *Eaton v. Alger*, 2 Keyes, 41, and *Thurston v. Cornell*, 38 N. Y., 281. The question of intent is, however, an element in the case, and the sum allowed for expenses may be so large as to raise the presumption that it is intended to cover a usurious transaction, and it would then be a question for the jury, whether or no such was the intention in fact. On this point the circumstances stated do not

enable us to express an opinion, except that the amount looks rather large for a *bona fide* allowance for expenses. There is nothing in the case to hinder B from setting up the plea of usury, if he chooses to do so, and it is a question for the jury to decide.

28. A holds a mortgage on B's property. There are two ways of foreclosing mortgages, one by order of the supreme court and the other by advertising in accordance with the mortgage. A uses the latter means and includes interest several weeks subsequent to date of first publication of notice. Can such foreclosure afterward be set aside, and how does it affect improvements erected in the meantime?

A. Unless it appears that the claim of more than was actually due was made for the purpose, or did in fact injuriously affect the mortgagor or subsequent incumbrancers, but on the contrary was due to an honest mistake, the validity of the sale will not be affected. (Thomas on Mortgages, 408, 404.) In case the sale is set aside the purchaser still retains his substantial interest in the property, but stands in the changed relation of assignee of the mortgage, which he can therefore proceed to foreclose anew. It would seem to follow that he would lose the benefit of any improvements made, but in our opinion a court of equity would not set aside the sale without protecting the interests of the purchaser in such a case.

MORTGAGOR.

29. Suppose a person is appointed executor to a will; the property by the will is a house and some furniture, which house was mortgaged and foreclosure proceeding instituted before the death of testator. In this condition the executor finds the property the debt under the mortgage probably more than the property will bring. Could the cost of protesting the will probably be charged to the estate and with the funeral expenses, have to be paid prior to the mortgage lien.

A. Such language as the following is continually to be met with in decided cases; "Funeral expenses are to be paid in preference to any other debt, out of the assets of the deceased, not excepting debts due by record, even to the sovereign." (Parker v. Lewis, 2 Devereux's Rep. (N. C.), 21.) The question is settled in South Carolina by statute, and the expenses specified are payable before debts due the Government or mortgagees (White vs. Stephens, R. M. Charlton R., 56). By the New York statute

also, funeral expenses are to be paid before the general distribution of the assets to creditors, and in *Rappelyea v. Russel*, 1 Daly, it was said that this expense "is a charge upon the estate of the deceased which takes priority over every other." Notwithstanding these *dicta*, however, the actual question above stated does not appear to have been decided, and there remains a shadow of doubt in our mind whether it is likely to be decided, without special statutory authority, in such a manner as to cast these expenses, incurred after forfeiture, as in the above case, upon a mortgagee. Where they were incurred before forfeiture, the mortgagee then having in New York a mere lien and not the legal title, we presume the decisions above cited would be followed, and the expenses allowed, on application to the Surrogate, out of the mortgaged premises.

30. Can a judgment for a deficiency arising upon a foreclosure of a mortgage be enforced against the property of the mortgagor, he having been served by publication of the summons in foreclosure suit, and not having appeared therein?

A. The judgment can be enforced against property of the mortgagor within the State where it was obtained; the recent United States Supreme Court decision on this point holding, however, that it cannot create a personal obligation against the non-resident debtor, or reach his property in another State.

31. More than 20 years since I purchased a plot between 56th and 57th streets, 125 feet in each street. The city subsequently took 50 feet for Madison Avenue, leaving me 75 feet on the east side of Madison Avenue. Quiet possession has been had ever since the purchase. The title is now being examined for a loan. The attorney reports an old road (once used) running along the south line of 57th street and extending nine feet upon my lots. This, he claims, makes the title imperfect. If this is so, I must remove it or pay his charges without getting the loan, unless I can remove the cloud.

A. The first thing to be done is to look up the original deed from the party who owned the lot and roadway before it was dedicated, and make sure that it contains no words which bind the lot-owner in the road line, reserving the fee of the roadway itself to the original grantor. This is not common in deeds, but it may happen to exist, and should it be the case, would make it necessary, as the next step, to acquire the fee of the roadway

from the heirs. Then an application should be made to the commissioners of highway (the board of Aldermen) to declare the discontinuance of the strip of land in question as a street. This action on their part would clear the title. Their refusal or neglect to grant the application would supply the basis of an action to remove the cloud.

32. A borrows a sum of money on his house, executing a mortgage, and his bond payable in three years, for the amount, interest payable semi-annually. One year later he sells his house to B, who assumes the mortgage and pays the interest regularly for fifteen years, when he fails, and the mortgagee forecloses the mortgage, and buys in the property for one-half the amount of his claim. Can he recover from A, the original owner and bondsman, the balance due him? A large portion of this consists of back taxes on the property and expenses of foreclosure.

A. We fear that A is liable, on his bond, to make up the deficiency. Being a sealed instrument, the bond runs for twenty years from its due date, or last payment of interest by the obligor.

33. The holder of a first mortgage foreclosure and the mortgaged property is sold without leaving any surplus towards paying a second mortgage. Can the holder of the second mortgage on the same property, in virtue of the bond claim from the mortgagor notwithstanding?

A. The bondsman is bound to pay the debt if the property does not bring sufficient for the purpose.

34. Has not a mortgagor the legal right to demand that any payment, either of principal or interest, shall be indorsed on the bond?

A. The established custom has long been to enter all payments on the bond, and we are disposed to think the courts would now recognize this custom as having acquired the binding force of law, but we know of no actual decision to that effect. The way to test the question would be to apply for an order requiring the holder of the bond to make the entry.

35. A owns a house and lot, gets a loan on it from B, then sells the property to C. After several years (three or four) the mortgage is foreclosed. Is A liable to B for back taxes and assessment if property does not bring enough to cover mortgage, or for only amount of bond and back interest?

A. A is only liable to B for any deficiency on the bond, after the property has been applied toward its payment. But it will amount to about the same thing, as the taxes and assessments constitute a lien superior to the mortgage, and the deficiency will be increased by the amount of these liabilities. As these may cover the whole value of the property, A may be made liable to the full extent of his bond.

36. Cr.—A purchases lot to build on, borrows money of B, mortgages the lot and building as security, then sells to C, subject to said incumbrance. C pays interest on A's note for some years; property declining in value, rents fall off, and C concludes to abandon the premises, though at a large sacrifice. Can B collect of C's other property, which the mortgage does not cover in the State of Connecticut?

A. It is well established law in Connecticut that in such cases the person who takes an estate subject to the payment of incumbrances upon it, becomes personally liable for the deficiency, if any, resulting from the sale of the mortgaged property. *Foster vs. Atwater*, 42 Conn. Reports, 244, and cases there cited.

37. Cr.—A mortgage is usually given in this State in this manner, viz.: A deed of the property is given by mortgagor to mortgagee in its terms to be null and void on payment of a note for the same amount of even date. Now I would ask you, in the event of foreclosure can any other property of the mortgagor which may exist, be held liable in case of the property not proving worth the amount of the mortgage? There is no bond, you see, given in the transaction. And again, if the property be sold by the heirs of the original mortgagor, can the mortgagee, in case the property sells under foreclosure for less than the amount of the mortgage, go back on the estate of the original mortgagor to supply the deficiency? Had I not better get a bond and mortgage, such as is given in New York in loaning funds of an estate, in future transactions?

A. The note which is usually given in Connecticut, and which is described in the condition to the deed, is equivalent to the bond given in this State, and answers the same purpose. If that note is not paid and satisfied out of the premises mortgaged, the maker can be compelled to pay it out of any other property subject to execution.

38. Cr.—Can Jones, residing in this State, and being bondsman on a mortgage held by a firm in Jersey City on property in that city, be held for deficiency in the event of foreclosure by mortgagees, without

a personal service on Jones? and also, whether Jones can be personally served except found in New Jersey, and before a decree is granted.

A. This question has been substantially settled by the United States Supreme Court, without reference to the laws of New Jersey, at the present term. The Albany *Law Journal* of March 2 gives the following syllabus of the case: "A personal judgment rendered in a State court in an action upon a money demand against a non-resident of the State, without personal service of process upon him *within the State*, or his appearance in the action, upon service by publication, is without any validity; and no title to property passes by sale under an execution issued upon such a judgment." Pennoyer, plff. in error v. Neff.

39. N. J.—Please inform me how long a mortgage on property in New Jersey that is past due is a lien on the property, where no foreclosure proceedings have been commenced.

A. The general rule is, that the statute of limitations does not begin to run against a mortgage until condition broken, or non-payment of interest. If thereafter the mortgagor continues in possession of the mortgaged premises without payment of interest or rent, or admitting the existence of an outstanding mortgage debt, a presumption is created that the debt has been paid. The New Jersey authority on this point is *Evans v. Huffman*, 1 Halst., Ch. 354.

40. N. J.—An owner of real estate gives two mortgages covering the same property to two different persons, one for \$5,000, one for \$1,500. These mortgages are both acknowledged the same date. The \$5,000 one is placed on record within a few days, and the \$1,500 one still later. The parties to these transactions being now deceased, the executors of the two estates each claim his to be the first mortgage. The executor representing the \$1,500 mortgage claiming precedence on the ground that it was so understood between the parties at the time of executing the papers. In law can this be so, ignoring the records?

A. An incidental remark of the New Jersey Chancellor, in the case of *Gansen v. Tomlinson*, 8 C. E. Green, 405, where it was held that the priority of registry in the case of two mortgages given at the same time to the same person, did not create a preference, leads to the belief that the same conclusion would be reached in the case presented by our correspondent, the Chancellor saying that the statute only gives that effect as

against subsequent mortgages without notice. If the \$5,000 mortgage was actually delivered last, with full notice of the other, the decisions justify the opinion that prior registry would not give a preference, and we incline to the belief that under the circumstances a court of equity, in which mortgages are foreclosed in New Jersey, would give the preference to neither, but require them to be satisfied *pro rata*.

NATURALIZATION.

1. Can an alien who declares his intention to become a citizen, and to whom is denied the privilege of a passport until he is fully admitted, obtain any other papers to enable him to enter any countries where passports are required? or if not, what expedient is left to him?

A. In many countries a passport is necessary. Where one is needed, the traveler may obtain from the resident consul of the country to which he is going a pass that will answer his purpose.

2. 1. Can American parents residing abroad claim American citizenship for their child born there? If so, on what conditions?

2. Can a resident not naturalized, own real estate in this country? If so, can he or she, in case of death, bequeath the same to relatives here or abroad?

A. 1. A child born abroad of American citizens formerly residing in this country, can claim American citizenship without any conditions. If that child never comes to reside in this country, his children cannot assert the claim; but if he ever does reside here, then his children are citizens, although born abroad.

2. By declaring an intention to become a citizen, resident aliens in New York may hold and bequeath real estate for six years thereafter.

3. I am an Italian by birth, and at the age of 19 I left my country for New York, where I have been residing ever since (nearly five years), consequently failing to present myself to serve my town in the Italian army, as required by the laws of that nation. Should I get my papers out as a citizen of the United States, and then go to Italy to settle some private business, to return afterward to America, could the Italian government then cause my arrest while there, and punish me in accordance with the law as a deserter? I shall become an American citizen, but am I protected if I am compelled to go back to Italy for a temporary stay?

A. If you become a citizen of the United States, and visit Italy on temporary business, with an American passport, you will be protected by our government. You will do well before you start to have your passport countersigned by the Italian Consul at this port.

4. I have been in the country four years. If I wish to become a citizen how long must I wait before I can get my papers? I am now 18 years of age, but my father is not a citizen? If I were a citizen, could I go to Europe without any risk of being taken for military services?

A. Our correspondent cannot become naturalized by his own act until he is of age. When this occurs, and he has taken out his papers, he will be protected by our government while traveling abroad.

5. I was born in _____ November, 1847, came to this country in October, 1867, went to the West Indies in 1869, whence I returned in 1871, and have lived here ever since. Suppose I should, with witnesses testifying to time of my sojourn here, apply for and receive my first papers to-day, how soon would I be entitled to my second papers, making me a full fledged citizen of the United States? Please cite the law.

A. The applicant must wait two full years from the date of his first papers before he can become a citizen. Only a minor who resides here three years before obtaining his majority can, after five years residence, take the second papers at the same date he makes his declaration. U. S. Rev. Stat., sec. 2,165-6.

NEGLIGENCE.

1. I have a store on Broadway. The windows on the lower or first floor are of plate glass for which I paid \$150 a pane. Through an accident one of them is broken by a passer by. Can I collect through law \$150 for it?

A. The responsibility of the "passer by" will depend on the nature of the accident. If a mad steer tossed him through the window he could not be required to pay; but if the accident occurred through his fault or carelessness, he can be held to pay the damage, whatever it can be proved to be.

NOTES.

HOLDER.

1. A note for \$600 was due and presented at G—— Bank on December 31st; funds being there to pay said note, it was certified and amount taken from maker's account. January 1 the G—— Bank suspended, and now the bank holding the original note looks to maker of it for payment; but bank book being balanced up, shows this \$600 as being paid and charged against us. Are we liable again to pay this note?

A. The holder who takes a certification instead of the money thereby relieves the maker. In the above case the bank holding the paper must stand in the gap.

2. A borrows an accommodation note from B (giving him his own for same amount as memorandum receipt) and discounts it at a bank, stating that it is not an accommodation note. He fails; must B pay the note, or, if he refuses, can the bank proceed criminally against A?

A. B must pay the note if he is solvent, the fact that it is an accommodation note being no defense to it in the hands of a third party. A might be held liable perhaps for obtaining money under false pretenses, but the note is just as good to the bank as if the representation was true.

3. A is in debt to B for merchandise and gives a check for the amount, dated on a legal holiday, but unnoticed on the day of signing it. B, on presenting the note at the bank for discount, is told to change the date, which he does, for example, from the 6th to the 5th, but informs A of the alteration a week after, who (A) expresses himself satisfied with it. A not paying the note when due, the 5th, it is protested. Can B collect the amount through the court, as A pretends not to be responsible for the note in consequence of the change in the date, although he consented as stated above?

A. The bank officer gave the holder very bad advice. In the first place a note dated on a legal holiday is just as good as if dated on any other day, and no alteration was required. But if such alteration had been essential, it should not have been made by the holder. "The alteration of the date, of the amount, of the rate of interest, or by adding the words 'with interest,' or of the time of paying interest, voids the note." *Fay v. Smith*, 1 Allen, 447; *Wade v. Worthington*, 1 Allen, 561; *Irving v. Michael*, 33 Mo., 398; *Story on Promissory Notes*, 408 a.

There is a question whether the drawer's acquiescence in the alteration is not a renewal, but under the circumstances this is of no account. As A has not paid his debt to B for the merchandise, a suit will lie for that, as well as for the note, and B has his legal remedy in this way. If the note is void or not paid, the liability of A for the merchandise is still the same. If the statement is true in all its parts A is a rogue, and B should collect his debt.

4. A gives his note to C with C's indorsement. The note is drawn to order of B, C indorsing. At maturity the note is not protested and B sues C, and recovers judgment against him; it was in evidence that C was to indorse as surety, and notwithstanding its non-protest, counsel held that it was in the nature of a joint note, judge so ruling, and the jury rendering a verdict for B.

A. The decision is good law, and presents nothing novel in its application. The lawful possessor of the note has the right to hold C as either indorser or surety; and proof that he signed as surety will render him liable without protest under the laws of any State.

5. A makes a note as treasurer to order of himself individually, indorses it "Pay B & C and D & E," two separate firms. B & C indorse, but by some neglect D & E do not. D & E have since failed. B & C now say, through their lawyer, that they are not liable because D & E failed to indorse. B & C received notice of protest, and since the failure D & E verbally promised to pay it. Under these circumstances are B & C liable, and within what time must an action be commenced?

A. The lack of D & E's indorsement was in itself sufficient reason for non-payment and protest, and if that were the cause it appears likely to have been the holder's fault, and B & C could not in reason be bound to stand in the gap. Their verbal promise, without some new consideration, would not bind them. As the case appears above, therefore, we do not think that B & C could be held as indorsers. An action against them, to test the question, would need to be commenced within six years from the date of protest.

6. We sold some goods to a party doing business in Indiana, for which we received his two notes. One note we sold before maturity, and the holder of the same accidentally omitted to send it for collection. The makers having failed in the meantime and gone through

bankruptcy, settled with all their creditors except with the one spoken of, who never received notice of bankruptcy or of any of the meetings of creditors. Can this party collect full amount of his claim, or must he accept compromise?

A. The holder of the note lost all recourse to the indorsers, if any, by his failure to present it. If the settlement made was a legal compromise, that is all the holder of the note can now collect.

7. A gave a note to B on the 28th of November, payable on the 1st of January. B sold the note. A went to B to buy the note, not knowing B had sold it. B would not own he had sold it, but tried to make out he did not have it with him. A afterwards found out that he had sold it. Now if on the day it becomes due B does not state that he has sold it, and cannot produce it, is A obliged to pay it?

Is there any law that unless the words "with notice" are written in the note, it is not entitled to notice?

By answering these two questions, you will greatly oblige.

A. If the note is negotiable, B is not obliged to notify A that he has sold it.

And A must pay it when due, if presented properly indorsed. The allowance of three days' grace upon promissory notes is established by custom in this State, and need not be mentioned in the document itself.

8. The payee presents for discount a note in which the day of the month is left out of the date; has he or any person other than the maker a right to insert the same, there being no evidence of the intention of the maker as to the precise date the note should bear? The note being forwarded to the payee by mail, would the date of the letter of the payee be proper evidence as to his intention as to the date of the note, so that the payee could insert it?

A. If the date is omitted, the holder, if he does not know the figures intended, may assume that the true date is the date when it was made or issued (Chitty on Bills, ch. 5, p. 169); or if that cannot be ascertained, from the day when its existence can first be established (Com. Dig. Fait B. 8; Bayley on Bills, ch. 7, sec. 1, p. 248). Or the holder may fill it up with an arbitrary date (even after the maker is dead), and the fact of such insertion is no defense to the demand for payment. Story on Prom. Notes, sec. 48; Usher vs. Dauncey, 4 Camp., 97; 22 Eng. Law and Eq. R., 516, and a host of other authorities.

INDORSEMENT.

9. A gives a note payable to B or order, with collateral specified therein to secure the payment thereof; A then takes the note to C (a bank) and gets it discounted for his own accommodation, leaving the collaterals with the bank. Can C (the bank) hold B (the indorser) and also the collaterals?

A. The indorser B can be held for the payment (*Willis v. Green*, 10 Wend., 517), and the collaterals are also part of the security.

10. Suppose I am the holder of a note which was dishonored at maturity, said note bearing five indorsements, and I choose to release the third indorser for a consideration or otherwise, does such act of mine also release from obligation the subsequent or any of the other indorsers?

A. A release of any one indorser will release all subsequent indorsers.

11. F sells a note of M & Co., payable to the order of F to the broker L without recourse. This fact (that it was sold without recourse) is however not written or stamped on the note, but the broker L gives F a written release from any responsibility arising from his indorsement. L sells the note to Y on its face, that is, without mentioning anything about a release having been given to F. The note goes to protest, the broker L has failed meanwhile. Is F liable for the note? And how is it, if the rate of interest allowed by F to the broker was more than 7 per cent. per annum?

A. F is liable for the note. The bargain made by L does not bind Y, and the latter can compel the indorser to pay, the rate of interest being no bar to the recovery.

12. A banker discounts for A B his note indorsed by C D. Before the note matures, C D, the indorser, dies. A B fails to pay the note at maturity and it is protested for non-payment, notices of protest being properly served. Pending the settlement of the estate of C D, the banker renews the note of A B, with another indorser, and as agreed between him and the maker, and new indorser holds the old note indorsed by C D as collateral for the new note. The note is kept renewed and the interest paid until the administrator is ready to settle claims against the estate of C D. At the time of proving claims against the estate of C D, the administrator holds that the renewal of the note without the consent of the administrator released the estate from any liability. Is he correct? The maker was insolvent before the death of C D. Please give authorities.

A. If there be any valid agreement between the maker of a

note and the holder, whereby the holder agrees to give credit to the maker of the note after it is due, or whereby the payment is postponed to a future day, and this agreement is made without the consent of the indorser, the latter is thereby absolved from all obligation to pay the same. Story on Prom. Notes, 413; Bayley on Bills, ch. 9, pp. 441, 444, 451, 452. All the authorities agree that giving time to the maker, or taking from him any other security, such as a negotiable note with another indorser, will release all the old indorsers.

13. Is there any form of demand note that can be made that will absolutely hold indorser or sureties as long as the maker?

A. The note may be in the ordinary form, indorsed as follows: "I guarantee the payment of this note, if demanded of the maker, within — years from date." We think this would accomplish the object desired.

14. I give K a note at 12 months to his individual order; K indorses it and gives it to L in payment of a claim. Thirty days before the maturity of the note K notifies me not to pay the note to L when it becomes due, and declares his indorsement null and void. To whom must the note be paid?

A. The indorser who has delivered the property to another cannot stop the payment on a simple notice to the maker. He can only stop it by legal proceedings enjoining such payment.

15. A sells B certain patents, receiving in part payment therefor notes, the interest on which, according to the agreement of assignment, is to be paid monthly. Should the notes show on their face that the interest is to be paid monthly, and should it be indorsed on them when paid, or will a receipt from A be sufficient?

A. The notes should state that the interest is to be paid monthly, although that is not indispensable. If the notes are not negotiable, A's receipts for the interest are as good as the indorsement. But if the notes are negotiable, then A may pass them to another, and if the latter took them in good faith, and nothing is said about the monthly interest on the document itself, he can collect the back dues in spite of A's receipt.

16. A fails and compromises with his creditors, giving as indorsers on his notes C and D each individually. A draws note payable to B, one of his creditors. B wishing to sell the note indorses on the back,

"without recourse." Will the indorsers C and D be holden to another party who buys the note, and if so, can they recover from B, he being the first indorser, though C and D were the sureties?

A. B can indorse without recourse to himself and have the note good against all the other parties.

17. Do the words "without recourse," and signed by a person on the back of a paper, payable to one's order, absolve the person so signing from any legal process by holder, if not paid at maturity? Also, if there are two or three indorsers and the last one indorses "without recourse," is not he absolved and the others held if protested for non-payment?

A. The words "without recourse to," or "without recourse in any event to," written before the signature, will remove all liability from the indorser if the obligation is not paid, leaving all other parties held for the same if duly protested.

18. A note made by A and indorsed by B, in case of A's failure, would B be compelled to pay the whole amount?

A. If the note is duly presented and B is notified of non-payment, the whole amount due, with interest and costs, can be collected of him if the holder so elects.

19. A makes a note to his own order, or to the order of B. B indorses the same; the note when signed and indorsed was not dated, a fact which the maker and indorser were cognizant of. Some time subsequent to the making of said note as above described, A carries it to C for discount, and dates the note the day of the discount. Does the fact that the note was dated after indorsement impair the liability of the indorser? Or if the indorser was unaware of the fact that the note was not dated at the time he indorsed it, would that affect differently his liability? Again, if the indorser is held under such circumstances, will you please inform me how long A could retain such a note, and subsequently date it and get it discounted, so as not to impair the validity of the note?

A. A person who signs or indorses a note in blank is liable to a third party who takes it in good faith for the promise with which the blanks have been filled. And there is no limitation as to the time after the signature when such paper may be filled up and issued, if the parties are still alive.

20. Money obtained on a note payable to order at a bank, with genuine indorsement, and the maker's name forged, whose loss is it, the bank or the indorser?

A. A man who indorses a forged note that is made payable at a bank, and obtains money thereon from the bank where it is payable, is liable for the amount, and if he can be found and is solvent, the money may be recovered from him.

21. A wishing to raise money, makes his own note in favor of B, and gets B to indorse it for accommodation. The note is offered for discount, but is declined. A then induces another friend, C, to indorse, and the note is discounted for A's benefit. At maturity it is protested for non-payment, the maker having failed. The following day C pays the note. Has he recourse upon B, the first indorser, for the whole amount, or must the indorsers divide the loss equally?

A. Unless there was some further understanding, C can collect the whole amount from B, with costs of protest besides.

22. How far is an indorser of a note holden when the maker becomes insolvent, and settles with his creditors for fifty cents on a dollar?

A. If the maker settles with his creditors and obtains a release, that discharges the indorser from all obligation.

23. In applying the rule of law that every indorser of a bill or note guaranties the genuineness and sufficiency of all previous indorsements, would not a teller, in paying checks to a bank, be safe in paying on the indorsement or stamp of the bank alone, without troubling himself to examine the indorsements previous to that at all?

A. If the collecting bank is good beyond question, the drawee is safe in making the payment without evidence as to the genuineness of the other indorsements.

24. Should a note payable in three equal annual installments, with interest payable semi-annually, and having an indorser, be protested when each part payment becomes due to hold the indorser? The case in question is this: The interest was paid twice (semi-annually), and the first part payment, one-third of the entire amount, was paid when due, and these three payments were all paid by the indorser, without protest, but when the second annual payment became due the bank failed to protest. Can the indorser be held, or has each part payment to be protested, just the same as three distinct notes?

A. To hold the indorser he must have notice of each default.

25. A holds a note of B indorsed by C. If A accepts a compromise from B, has A any claim on C for the balance?

A holds a note of B indorsed by C. If A accepts a compromise from C, has A any claim on B for the balance? BANKER.

A. A release of the maker on any terms will release the indorser, but a total release of the latter on whatever terms does not affect the liability of the maker, to the holder, except for such part of the note as may have been paid.

26. A receives a note from B, having C's indorsement as security for its payment when due. Before the maturity of the note C died; now, what shall A do with the note to make C's estate responsible? The note is not due yet.

A. The holder of the note will do well to notify the executor of the liability of C, but unless the note has still a very long time to run, it will probably mature before the estate can be settled. A notice of protest in such a case will secure the legality of the claim.

27. How long is the signer, Richard Roe, as surety to the following note, held responsible for the payment of the same, provided he is not notified of non-payment? Will it make any difference as to the responsibility of the said Richard Roe whether the note remains in the possession of the said John Doe, or has changed hands one or more times?

\$100.

Fort Covington, N. Y., Jan. 1, '79.

One year after date, for value received, I promise to pay to John Doe, or order, one hundred dollars, with use.

JAMES BROWN.

RICHARD ROE, *Surety*, T. T. K.

A. Richard Roe is liable as a joint maker, and is held as long as his principal for the payment of the note.

28. Is the indorsement of a wife on her husband's note, she holding real estate in her own name, of any use?

A. If the inquiry refers to this State, we answer that the indorsement is good if in proper form. For example: "For value received I hereby charge my separate estate with the payment of this note." In States which have not adopted our progressive legislation with respect to the property of married women, a woman's indorsement of her husband's note is of no value.

29. I take a note payable to my order at bank, now is an indorsement on the back by a third party of any use to me? If the maker fails to pay, can I collect of third party?

A. The Supreme Court of the United States has just decided that an indorsement on a note by a third party made before the

same is delivered to the payee constitutes the said indorser a co-maker or guarantor. We gave the same answer to the same case before it was litigated.

30. If A gives his note with his wife's indorsement thereon to B, and the note is protested, can B bring an action against Mr. and Mrs. A jointly, and when judgment is rendered can the sheriff levy on the property of Mrs. A?

A. Unless the wife's indorsement was given with a distinct contract to make it binding upon her separate estate, or it can be shown that the obligation was for the benefit of such estate, or of her independent business relations, we do not think a judgment can be obtained and satisfied out of her individual property.

MAKER.

31. I hold a promissory note falling due on January 28, and the maker having acknowledged his inability to pay it at maturity, wishes me to withdraw it from the bank where it has been deposited for collection, and exchange it for a new one, extending the time of payment. I have, properly filed, a document securing the payment of this particular note. It occurs to me that I should better receive from the maker the interest up to the time the note is due, and retaining it, receipting for it on the back, rather than take a renewed note.

A. If the "document securing the payment" of this note is nothing more than an ordinary guaranty, our correspondent will do well to use a little caution about either course of which he speaks, as whether he extends or renews the note, such guaranty for its payment will be worthless, unless the guarantor consents to the arrangement.

32. I hold a note against a person who died a month ago. This note becomes due on the 30th day of this month. He died intestate, but the wife is appointed by the court without opposition as administratrix of the estate. Now what I want to know is this: It is desired by the administratrix to have this note extended for 30 or 60 days longer, with a person acceptable to me as an indorser, which I am perfectly willing to do; but how is this note to be extended? What are the legal forms of such transactions?

A. The death of the maker of the note operates as an extension, and the payee could not enforce its payment in any circumstances within six months. For this reason the promise of an indorser to guaranty the payment of the same on account of

30 or 60 days' further time would be valueless, being wholly without consideration. An agreement between the payee and a third party, by which the latter secures the final liquidation of the debt, if duly executed for a consideration, would be valid ; but neither the administratrix nor any guarantor would execute such an undertaking without a misapprehension of the obligation of the former as to her duties concerning the payment of the note at its maturity.

33. A note was mailed from a western city which was lost. It has been advertised three times ; payment has been stopped where the note was payable. Can suit be brought against the makers when the note is due, if note was held by innocent parties ?

A. The maker can be compelled to pay, but the loser must be prepared to furnish ample bonds that the lost document will not turn up to the maker's loss.

34. Should A issue a note for 30 days, at the expiration of which time the note is not presented, but is held for two years, when not only the principal but interest is claimed, on the ground that A should have hunted up the holder and paid his note when due, would such a claim be good in the eyes of the law ?

A. Interest would be due beyond question. If A did not mean to pay interest he should have hunted up the holder and paid the note, for it carries interest from the time it was due, at any rate, even though, without interest up to that date.

35. A gives a note to B payable on the first of January, payable at a certain bank. The first of January being a legal holiday, A deposits his money in his bank to meet his note on the 30th December. B does not get his note certified nor present it at the bank where it is made payable, but deposits it in his bank with his daily deposits on December 31. On January 2, B has A's note returned from his (B's) bank, as the bank where A had his funds had failed at 3 P. M. on December 31. Now who is responsible for the payment of the note ? and must A pay his note over again to B or not ?

A. The failure to present a promissory note at the place where it is payable on the day it is due, will discharge from responsibility all parties but the maker. It will not wholly discharge him as to the principal, but it will relieve him from all damages and charges for default ; and " if any loss has been incurred by the failure to present, this may be set up as a matter

of defense" when he is pressed for payment. (*Daniel on Negotiable Instruments*, vol. 1, page 478; *Armistead v. Armistead*, 10 Leigh, 525; *Foden v. Sharp*, 4 Johns, 188.) There can be no question in the case above cited, that any loss suffered by the maker of the note because of failure to present it on the day of maturity will fall on the holder. The note due January 1 is by express statute in this State payable on the next previous secular day, which was December 31. Story on Promissory Notes, vol. iv., sec. 227, states that the maker "is under no obligation to pay the note until presentment and demand has actually been made at the banker's or other specified place; and if he has suffered any loss or injury by the want of a due presentment, to the extent of that loss and injury he will be discharged as against the holder." *Rhodes v. Gent*, 5 B. and Ald., 244, and many others.

36. If a note drawn to the order of the maker and indorsed by him, is lost or stolen, and sold by the finder (or thief) to a third party, has the maker of the note any defense against such holder, or is he obliged to pay the note?

A. Negotiable securities are good in the hands of one who purchases in good faith and before maturity, although the seller may have found or stolen them.

37. A borrows B's note, payable to A's order, in lieu of money. A has same discounted. Before the note matures A fails. Question: Can the bank hold B for payment of such note if B has never had any value received? If not, and the bank charges the note up to B's account at maturity (B doing business with same bank), can B recover the amount of the note from the bank?

A. If the holder pays value, it makes no difference whether the maker or indorser ever received a cent of the money; they are both holden for payment, and the bank can charge the note when due to B's account.

38. A time paper is made payable at Bank A; it is discounted at Bank B, which holds it when due. On notice of date when due the maker offers the holder, Bank B, payment for the whole amount on the day preceding the last day of grace. The bank refuses to receive payment on that day on the ground that it was the next day's business. With these facts for a basis, please inform me: Had the bank the right to refuse to accept payment because the last day of grace had not

approached? Believing the bank ought to have accepted payment when offered, the maker of the note did not make any tender the next day, and the bank protests the paper; could the drawer be made to pay cost of protest? Can Bank B protest paper made payable at Bank A?

A. The note is not payable until the last day of grace, except at the option of both parties. But the note must be presented at Bank A, where it is payable, before it can be legally protested. As it appears that it was not thus presented, the indorser, if any, is not liable, (having been released by such failure to present on the day of maturity,) and the maker, if he had the funds at Bank A to meet the paper, or if he had made provision there to meet it, cannot be charged with any costs of either protest or suit until such demand is made.

39. We received a note from a person who omitted to fill in the blank where the same was payable.

The note was left with our bank for collection, and forwarded by it to a bank located some fifteen miles away from where the maker of the note resided.

On the day when the note came due, we received a postal card from the maker, stating that he had received a notice from a bank "that they held his note and demanded payment," and that he would not go to the expense to hire a team in order to pay the note. Was it the bank's duty to present the note to the maker at his residence, in the absence of any other place being designated for payment? Or was it the maker's duty to go to the banking house and pay the note, he having been duly notified of its whereabouts? Had the bank a right to protest the note, they never having presented the same to the maker?

A. If no place is appointed for payment, the obligation must be presented at the place of business, or if none can be found, at the house or residence of the maker, if that can be found; the demand "cannot be made by letter through the post office" (Kent's Comm., vol. 3, sec. 44, pp. 95-97), "but due diligence must be used to find out the party and make the demand." So, also, read all the authorities and decisions. The note in question cannot be lawfully protested without such a presentation where the maker's residence is known. The presumption is that the maker resides where the obligation is dated, and if there is no other residence it must be presented there, but if it is known that the maker lives elsewhere in the State, then the demand

must be made where he resides, and anything less than this is not due diligence in the collection of the note.

40. If a note which has been discounted at a bank before maturity is made payable at the office of a merchant, must the holder of the note present it at the merchant's office? If the holder must present it at said place, should he present it before 3 P. M.?

A. The note must be presented at the place where it is payable, if at a bank, during banking hours; if at an office or place of general business, during business hours; if at a residence, during family hours; and if the maker or some one for him is not ready with legal-tender currency to pay it, the holder need not call again. A check, even if certified, is not a legal tender, and may be lawfully refused.

41. Below we give you description of a note:

BANGOR, Me., July 1, 1879.

Six months after date we promise to pay to the order of S. Greene one thousand dollars, value received.

(Signed)

JAMES MONROE & Co.

The question we wish to submit to you is, where is the above note payable, there being no particular place named in the body of the same?

A. Where no place of payment is specified a promissory note is payable at the maker's place of business, or if none is known, at the residence of the maker, if that is known and within the State. But where the maker of a promissory note resides and has his place of business in one State, and actually dates, makes, and delivers a note in another State, the holder may demand payment at the place where it is dated, and if upon reasonable inquiry he cannot find the maker within the State, or any one to answer for him, he may protest it for default. Story on Promissory Notes, sec. 386.

42. A owes B \$200 for which he gives his note. The note is now due and A wishes to pay it, but B cannot produce the note and says it is lost. He is irresponsible. If A pays the money, how can he be secured against paying it again should the note subsequently turn up in other hands? or if A does not pay it, can he stop the interest?

A. The law of this State provides for the collection of lost notes, the loser to give bonds in two sureties to guard the maker against loss. We have no doubt that the maker can stop the in-

terest if it is due, by paying the money into a trust company and advertising for the note with a caution that the interest has ceased.

43. In the case of a bill of goods bought on three months' note or in place of note (privilege of) discount for cash for unexpired time, would the buyer be entitled to the three days' grace of the note in cash settlement?

A. If the note is actually given, and then discounted by the maker, he is entitled to have the interest for the remaining time including the three days' grace deducted; but if the purchase stands on open account, no grace is allowed in the reckoning.

44. A & B and C are two firms mutually indorsing bank paper, both members of the first firm knowing and agreeable to the arrangement. A bank declines accepting A's indorsement of his firm's name, though allowing B's to be good. Are not both liable, and is not the bank wrong in thinking that A is not legally responsible?

A. We cannot, from the narration, see any reason why A's indorsement of the name of A & B is not as good as that of B; but if the latter is the capitalist of the concern, and the notes are accommodation paper, there may be a greater sense of security in having the signature of the latter.

MISCELLANEOUS.

45. If A lends B his note without consideration, payable to B's order and by him discounted for his own accommodation, and when due B fails to pay the note, can it be collected of A?

A. A cannot collect it of B, because he has given nothing for it, but it is as good in the hands of a third person who has given value for it as if B had received the money himself.

46. We buy coffee from New York jobbers on 60 days, giving note to our own order, payable at office of seller. Our custom has been to remit check at maturity, payable to order of seller, trusting him to cancel the note and return it. Should the payee collect such draft, and having discounted our note, fail before it was presented to him for payment, what is our recourse?

A. When a check is remitted expressly to cancel a particular note, it is a breach of trust to apply it to any other object. The receiver cannot even apply it to liquidate another debt due from the sender. The remedy of the latter is the same as in any other like breach of trust.

47. In the matter of a commercial note to be offered for sale if, in drawing it with reference to time of maturity, it be dated on a Sunday, is it a legal note in this State, (N. Y.,) or in Massachusetts?

A. There is no State in the Union in which a note is void or the obligation of the maker in any way affected simply because it is dated on Sunday.

48. If a note falls due on Monday, and it is a legal holiday, can the bank insist on protest fees if the money is tendered Tuesday morning following?

A. By statute in this State, (N. Y.,) all bills and notes falling due on a holiday, are made payable on the business or secular day preceding the holiday.

49. Six months after date we jointly promise to pay to G one hundred dollars, value received.

Signed, A.
B.
C.

(Dated.)

A and B both refuse to pay anything when the note becomes due, C has paid one-third of the above amount one month before it became due. In case of a suit, can C be held for anything more?

A. The chief distinction between a joint note and one that is joint and several, is that in the former suit must be brought jointly against the parties, while in the latter either may be proceeded against. But judgment having been recovered against the joint makers, the execution may be satisfied out of the property of either, and he can then compel his associates to contribute, each his share. In the above case there is only one obscure point, not cleared in the statement. A release of one joint maker is a release of all, and if C was legally released when he paid his contribution the whole is void. But if C was not released, he is still liable for the remaining sum.

50. January 1st, 1877, A as trustee sold B real estate in Georgia and took his note at three years after date, interest semi-annually, B reserving the right to pay the note before maturity. About April, 1878, C is appointed trustee and removes to New York. July 1, 1878, B (having had notice of the change of trustees) offers to pay his note and interest, and is then notified by A of said change. B writes to C, but as he has had no notice of transfer, he claims that he should not be charged interest after July 1, 1878, although the payment was delayed to July 12th. Is B liable for the 12 days' interest?

A. The debtor B must make actual tender of the money to

the person authorized to receive it, before he can stop the interest; the delay is therefore his misfortune, as he loses the interest.

51. A note drawn on the 15th of the month, and instead of being made due in 15 days, reads "On September 1, pay to order," etc. Is it to run 15 days and three days' grace, same as if made due in 15 days?

A. A note made due at a fixed date in the future carries three days' grace (unless the words "without grace" are used in the contract), precisely as if it matured on that day by a reckoning of so many days from its date. A contract in a promissory note to pay money "on September 1," is really an undertaking to pay it on September 4, and it cannot be protested for non-payment until the latter date is reached.

52. Can a note secured by collaterals, payable on a specified day, be paid sooner, without the consent of the payee?

A. It makes no difference how the note is secured, "payment can only be made before maturity by consent of both debtor and creditor." *Ebersole v. Redding*, 22 Ind., 232; *Daniel on Neg. Ins.*, vol. 2, page 238.

53. A & B are partners in the steam mill business. They buy a mill, A paying cash for his half, and stands B security for his half, B goes into bankruptcy. The law in North Carolina is that securities are released after three years; the note has stood over three years. Is A responsible? (B paid interest annually).

A. The payment of interest prevented the statute of limitations from taking effect so as to release A, unless he has given the statutory notice to the creditor, requiring him to take legal measures for the collection of the debt from B, the principal. So far, therefore, as appears from the above statement of the case, A still remains liable.

54. A makes a note to B, who indorses it and gives it to C. A does not live in the State, and B, his partner in business, pays the interest on the note to C, charging A's account with the interest. Will you please inform me (the note is now overdue) if there is any danger of its being shut out by limitation, notwithstanding the interest being promptly paid upon it? Can B still be held as an indorser?

A. In this State the indorsement of the interest on the note

by authority of the debtor takes the note out of the statutes of limitations, and a payment of interest stops the running of the statute against the surety as well as the principal. If B received due notice of non-payment at the date of the note's maturity, both he and his principal are held by his continued payment of interest under the authority of and by consent of the maker.

55. A gives B his (A's) note to his own order in settlement of merchandise bought. This note is stolen by C, and immediately the loss is discovered by B, who advertises the fact in the papers. After the announcement of the loss D buys the note in the open market from C. Now who loses the value of the note, D or B?

A. The note is good in D's hands if he bought in good faith without notice. The advertisement in the paper, if D has not seen it, is not a sufficient notice to bar D's recovery, although it may raise the question whether he exercised due diligence. The notice must be in some way brought home to him before he can be non-suited in his claim for payment.

56. A legal friend says that it is law, if I make a note due 12 months after date drawing 10 per cent. interest per annum, that I can only collect the 10 per cent. for that 12 months: in other words, if the note lapses any length of time I can only collect legal rates of our State for the lapsed time—my friend claiming the note should read 10 per cent. per annum until paid.

A. The statement is correct, for the reason that the amount of interest payable after the note falls due is a matter of law and not of contract, the contract being only for one year, and 10 per cent. interest is only collectible where expressly stipulated and for the period stipulated.

57. State when a note matured, drawn November 30, 1878, at four months.

A. The rule is: A note due in one or more months from date matures on the corresponding day of the month up to which it is reckoned, *if there are so many days in that month*, but if not so many, *it then matures on the last day of the said month*, to which the usual grace must be added. Thus a note dated Nov. 30, 1878, at four months, matures March 30th, and is payable, with grace April 2d. If dated November 28th, 29th, or 30th, 1878, at three months, it falls due February 28th, 1879, and is

payable March 3d, all three of these dates making the note due on the same day. A note at two months dated either December 28th, 29th, 30th, or 31st, 1878, will mature February 28th, 1879, and each of them will be payable March 3d ; there being no day in February, 1879, later than 28th, all notes reckoned up to that month and bearing date of the 28th, *or after*, mature on the 28th and are payable three days after.

58. Will you state what is the law and custom of counting time on notes payable, say, 4 months after date ? Is it counted from the day it is given to the same day in the month it falls due, or, is it counted by days, counting 30 days to the month ?

A. In this State it is usury to reckon full months as 30 days each, that being at the rate of a year's interest for 360 days. The law requires all full months to be reckoned as such (from the date in one month to the same date in the next) whether longer or shorter ; then the grace or other odd days are computed as each one-thirtieth of a month. This gives at the rate of 365 days to the year for the full months, and at the rate of 360 days for any period less than a month. It is a custom with many merchants (and not a few banks adopt the same reckoning) to find how many days there are in the time the note has to run, to divide these by 30, reckoning the quotient as so many full months, and the remainder as each one-thirtieth of the month. This is an overcharge, as it takes twelve months' interest for 360 days, six months' interest for 180 days, and three months' interest for 90 days. A note is dated December 1st at two months. It is entitled to one-sixth of the year's interest for the two months, and to $\frac{3}{360}$ ths of the same for the three days' grace ; but by the false system of reckoning the two months (62 days) as two months and two days the interest will be calculated as one-sixth and $\frac{5}{360}$ ths of the year respectively, making a clear extortion of the two days' interest on a two months' note running through long months, and of six days on every year's account.

59. Is a promissory note signed under seal negotiable, or can the indorsers be held liable for payment of same in case of the failure of the maker ? If it is not negotiable will you please give reason ?

A. We answer in the words of a recent approved text writer :

"The *first* requisite of a bill is, that it shall be an *open* letter of direction—and of a note that it shall be an *open* promise—for the payment of money. By the term 'open' is meant *unsealed*; and though the instrument possess all the other requisites of a note, its character as a commercial instrument is destroyed, and it becomes a covenant, governed by the rules affecting common law securities, if it be sealed."—Daniels on Negotiable Instruments, p. 27.

60. I sold to Z an invoice of merchandise amounting to \$2,000, in settlement of which I accepted his two notes of \$1,000 each, payable in two and four months respectively. The first note was protested for non-payment, can I sue at my discretion at once for the total amount of the above invoice, or whether I can sue for the protested note only, and then wait for payment or protest of the other?

A. We see nothing to prevent our correspondent from bringing a suit for the original debt of \$2,000, if he surrenders the unpaid notes, or files them with the other papers before the court.

61. A merchant sells a business note, through a note-broker to a bank. The note is not paid at maturity, and maker turns out a bankrupt. The note was sold "without recourse" or guaranty, or representation. Now the bank asks repayment from the merchant, or suit for damages, on ground of knowledge of the maker's rottenness?

A. If the sellers knew positively that the makers of the paper were bankrupt and the security worthless, and impose the same upon the bank under such circumstances, an action will lie for the recovery of the consideration. Parsons on Contracts, vol. 1, pp. 550, 551.

62. A gives a note payable to B, not to order, for — dollars. B trades the note to C, but does not indorse it; can C recover the amount from A or not? A claims the note was only payable to B and made that way purposely to keep him from trading it and to put the public on notice by its wording. If B had indorsed the note over to C would that transfer the title to C?

A. The note above described is not negotiable, and a third party who takes it, even with the proper indorsement, holds it subject to all the equities between the original payee and the maker. He can only sue the maker in the name of the said

payee, or as his assignee, and if the maker had a good set off, or defense against B, the holder C can collect it. Only negotiable paper indorsed in blank passes title by possession, so that whether B indorse it or not, C can only collect it in B's name.

63. 1. I hold a promissory note drawn by A, and feeling distrustful of him, sell it to B, who owes A a running account. Can C use that note as a set-off to his account with A?

2. I hold a promissory note which has been protested. If I sell it to B, can he use it as a set-off to his account with A?

3. I hold A's note not yet due, but he has failed, and is trying to effect a compromise with his creditors, and B knows this. If I now sell the note to B, can he use it as a set-off to his account with A?

4. I sell A a bill of goods on 30 days' time; at the end of 30 days I draw on him at 10 days' sight. The draft is accepted but goes to protest. Can I sell that draft to B to use as a set-off to his account with A?

A. Only in the first case named can B rely on the obligation as a set-off against his debt to A. It is a general rule that the purchaser of overdue and protested paper takes it subject to the equities between the original parties. There are exceptions to this, but it is the prevalent requirement.

64. B indorses a bank note for C, the note falls due, C does not pay and is notoriously in failing circumstances. B with a view to make him pay, offers to indorse a larger note on consideration that C takes up the first note. C goes to the cashier, states that if he had the note he could go to B and get a larger note indorsed. The cashier makes a copy of the note, saying on the back of it if the original is not returned within three days the copy must be paid, and gives the note to C, retaining the copy himself. C goes to B, and says he has taken up the note, hands it to B, who takes the note and takes off his name, and puts it in his pocket, and then refuses to put his name to the new note. Was the cashier right in giving the note to C? Was B right in destroying the note? Could the bank hold B for the payment of the note?

A. If the note was duly protested for non-payment on the day it was due, and notice sent to the indorser, we think that the bank, under the circumstances, can still collect the amount of him, notwithstanding the original was destroyed. But if not presented for payment and duly protested, then B, if only a simple indorser, could not be made to pay even if the bank held the note.

65. A. B. draws from Montreal at 60 days on Heatherston & Co., New York city, in favor of a Canadian bank, who forward the draft to their New York correspondents for procuring acceptance and collection when due. These finding no trace of such a firm in the city, without delay present the bill to Hotherston & Co., who accept the same. Now, is this acceptance by Hotherston & Co. binding on them? And does the omission to protest, when drawees could not be found, release the drawer and indorsers?

A. The holder of a bill who presents it for acceptance has a right to insist that the acceptance shall be absolute, unconditional, and in conformity to the tenor of the document. If without instructions he takes any other, he takes it entirely at his own risk. If the acceptance contains any qualifications whatever, or the signature varies in any manner from the address upon the bill, the holder may protest for his own protection and notify all the antecedent parties. If they acquiesce in the condition or variation, he is then clear, and no harm is done.

1. In the case above cited, the New York correspondents are responsible for any loss or damage which may occur in consequence of the acceptance under a different name if that proves to be erroneous.

2. The acceptors are bound by the resulting consequences of their signature, even if they accepted under an erroneous impression. Thus far as to what has been done, but as to what should have been done, our advice in such a case is this: When no drawee can be found to accept according to the exact tenor of the instrument, let a protest be prepared by the holder, and notice of the fact be sent to all of the parties interested, together with a statement that no one being found to accept for Heatherston & Co., a firm called Hotherston & Co., who may have been intended, have accepted for the honor of the drawer. This covers all the chances, and will do no harm to any one, nor leave any unpleasant responsibility upon the collecting agents.

PROTEST.

66. A note dated Augusta, Ga., one month after date to the order of Jones & Jones (with interest from date) and indorsed by Jones & Jones with no place named for payment, is necessary to protest the note at maturity of the same in order to hold the indorsers. The holder of the note resides out of this State. How would it be if the indorsers owned an interest in the property for which the note was given?

A. The omission of the place where the note is payable will make no difference about the protest. A notice of non-payment must be served upon the indorsers, if they can be found, in order to hold them.

67. Under any circumstances will notice of protest *after maturity*, hold indorsers of a note if it is shown that failure to present at maturity was owing to no neglect of the holder?

A. There are certain sufficient excuses for the non-presentation of a note at its maturity. These are classed as: 1. Inevitable accident, or overwhelming calamity. 2. The prevalence of malignant disease which suspends the ordinary operations of business. 3. The *vis major* (presence of political circumstances amounting to a virtual interruption and obstruction of trade). 4. The breaking out of war between the country of the maker and the country of the holder. 5. The occupation of the country where the parties live or the note is payable by the public enemy. 6. Public and positive interdiction and prohibitions of the State, which obstruct or suspend commerce. 7. The utter impracticability of finding the maker or ascertaining his residence.

There are also certain special reasons for non-presentation which operate as an excuse in particular cases. The holder who received from an indorser the note too late for presentation is excused as far as that indorser is concerned.

Where a note is an accommodation made for the benefit of a particular indorser who is to pay it, it need not be presented to such maker to hold that indorser, the latter being in reality the one who is to pay the note.

Also where there is an express waiver of presentation on the instrument itself, all parties who signed after this waiver are held without presentation.

But the death or insolvency of the maker is no sufficient excuse for non-presentation at his place of business, or wherever the note is payable.

68. A notary goes to a bank after bank hours to demand payment of a note, finds the bank closed, and no one there of whom to make the demand. Afterward, during the evening, he meets the cashier, teller or book-keeper on the street, or at his residence, and makes the demand. Is the demand under such circumstances legal?

A. If the note was payable at the bank, a protest under such circumstances would not be legal, unless the officer of the bank consented to represent the institution and receive the demand, and was enabled intelligently to reply that the maker of the note had no funds in the bank to meet the obligation.

69. A note made payable in New York city is presented on the day it is due at five minutes past 10 A. M., for payment. The bank having no funds in its possession to meet it, refuses to pay. Can the note be protested immediately, or has the party holding it to wait until 3 o'clock P. M.

A. The note can be protested immediately, and no further presentation need be made; but if the maker can find the holder at any time before three o'clock, and offer him the face of the note in legal tenders, he can save the cost of protest, since he is bound to accept it. If not made payable at bank he can tender the money and save the protest, at any time during the day.

70. C has a note indorsed by D discounted at the E bank and payable at the F bank, where C keeps his account. Some time before the note is due C fails. At its maturity the E bank sends it to the F bank for collection. At about noon that day, D, the indorser, appeared at the F bank and demanded the note, offering payment, but the teller of the F bank replied that the note had been returned to the E bank and further remarking that C's account was closed. Question: Could the note be protested and D held, payment not having been refused, and if not protested could the indorser D be held?

A. The note can be protested, and D held for its payment as well as the costs of protest. If instead of a *demand* for the note D had tendered the money, he could not be held afterward for the costs of protest.

USURY.

71. What is the law in the following case? A gives an accommodation note to B, the latter sells it to C at 18 per cent. per annum. C has this note discounted in his bank. Before the note becomes due B fails, and the bank asks A for the amount due, which is refused on the plea of usury. Can A be sued with success?

A. If C knew that the note was accommodation paper, and not good against A in B's hand, the plea of usury would be successful. It has also been held in this State, (N. Y.,) in several cases (*Powell v. Waters*, 8 Cow., 669, affirming the same in 17 Johns, 176), that if C did not know the facts, yet the note hav-

ing no pre-existing vitality, C takes it at a usurious rate at his peril, and no breath of life can be imparted to it by that transaction. The courts in most of the States, however, make a distinction between the two cases; if the third party does not know it to be accommodation, they hold he ought to recover, and any one receiving title from him would of course have the same right.

72. 1. Suppose Smith sells his note to Jones, a broker, at a usurious rate; Clark buys the note in good faith at a discount exceeding the legal rate, supposing the note at its inception was not usurious. Can Smith set up successfully in New York State the defense of usury against Clark? If so, in case Clark had bought the note at the legal rate, would his claim have been any better?

A. 1. The rule in regard to usury is that a note once tainted is always tainted, but once good is always good. If Jones takes the note at a legal rate it is good in his hands; if either Jones or the maker himself afterward sells it at more than the legal rate of interest, it is not affected, and the holder can recover.

73. A gives B a note for \$625.70 at 60 days. B indorses it and offers it to C at a discount of 2 per cent. per month. Will C be safe if he buys it, and can he recover from A or B at his option?

A. If the note is a *bona-fide* obligation in the hands of B before he sells it to C, then no matter how great the discount at which the latter takes it, the note is a valid claim against both A & B. But if A lends his note to B, and the latter has given nothing for it, then the sale to C, which first renders it binding on A, must be made at legal rates, or A has the defense of usury. After a note is binding on the maker, it may be sold at any rate, but the transfer which first renders it a valid claim against him must not be at usurious rates.

74. A capitalist in Massachusetts is in the habit of purchasing business paper of James, a note broker in this city. In the fall of 1872, when money was dear, he bought of James \$20,000 of stock notes, secured by shares of a stock concern in this city. Prime indorsed paper was selling at the time for 15 to 18 per cent. per annum, and he took these stock notes at 12 per cent., James assuring him that they were business paper. It appears that Jones, the maker of the notes, had authorized James, the note broker, to buy the shares of stock and advance the money, holding the shares as security. The market afterward became depressed, the shares which were purchased at par went

down to 90, and money being dearer it was not so easy to carry them. Jones could not pay up, and he gave his notes to James to cover the amount, the latter to sell them and to credit his account with the proceeds. These were the notes which James sold as business paper. When the paper matured, Jones refused to pay, put in the plea of usury, and obtained an injunction to prevent the transfer of the collaterals. Our correspondent wishes to know if the plea will stand in the courts.

A. We reply that it will depend upon the proof of the main fact that Jones gave James the note for a debt actually due him, he having advanced money to buy the stock, and that before James sold the notes to the capitalist they were a valid claim against the maker. This being proved, Jones's cunning and roguish plea to evade his obligations will be of no avail to him. If Jones merely left a lot of notes in the hands of James to be sold for the simple purpose of raising money, the notes being worthless until passed to a third person, and they were then sold to another at more than 6 per cent., the plea of usury will render them void. But if Jones actually owed James, and gave him the notes on that account, it will make no difference that the maker knew the holder would sell them at a discount, they are a valid obligation. But the plea, even if successful, will not save Jones from paying the money. If the notes are pronounced void, then the credit to Jones' account is void also, and James can sue Jones and recover the amount he owes for the purchase of the stocks. But we feel certain, if we understand the proof to be offered, that Jones can be compelled to recognize the validity of these obligations.

MISCELLANEOUS.

75. Cr.—If a note is made and dated on Sunday for value received, can it be collected the same as if made on a week day?

A. A note made on any other day and dated on Sunday, is good: but a note made and delivered on Sunday for a secular account, or for work not allowed on that day, would not be collectible in the Connecticut courts. Its delivery or acknowledgment on a week day, however, would give it a legal character.

76. Ky.—Please inform a reader whether under the laws of the state of Kentucky the following note sent to a bank for collection, is protestable for non-payment:

JIMTOWN, October 10, 1878.

Twelve months after date I promise to pay to the order of Jno. Jones Thirty-nine Dollars, value received.

TOM SMITH.

I understand that notes made negotiable and payable in and discounted by an incorporated bank in Kentucky, are placed on the footing of bills of exchange, but not plain notes of hand, as above.

A. Our correspondent is right in his understanding as to the class of notes on which the laws of Kentucky make protests obligatory. The note above recited does not belong to the class. There is a Kentucky decision, however, which permits protest to be made on obligations of that sort, for example, an indorsed certificate of deposit. (*Piner v. Clary*, 17 B. Mon., 645.) And all obligations of this character may be protested if the holder desires it. At any rate due notice of non-payment should be sent to indorsers.

77. PA.—The Supreme Court of Pennsylvania decided to the effect that a note printed for the past decades, thus 187—, and filled up during the present year, the 7 altered to 8, is invalid.

A. The Pennsylvania Supreme Court has repeatedly held that any alteration in a bill or note will avoid it, unless the alteration is shown to have been made before delivery. In three cases (*Paine v. Edsall*, 7 Harris, 180; *Miller v. Gilleland*, Id., 122, and *Heffner v. Wenrich*, 32 Pa. St., 423) the Court applied this doctrine to an apparent alteration in the date. The change of a printed figure by writing over it another falls clearly within the rule requiring an explanation of the alteration. In the last of the above mentioned cases the Court observed: "He who takes a blemished bill or note takes it with all its imperfections on its head. The very fact that he received it is presumptive evidence that it was unaltered at the time." We know of no decision which holds an instrument invalidated by the alteration of a figure without being contested on that ground, but an alteration of date being alleged in defense, the holder would be bound to show that it had been made before it left the maker's hands, and this we consider in accordance not merely with the Pennsylvania decisions, but with commercial law everywhere.

78. PA.—Will you kindly explain the operation of the law in regard to judgment notes and mortgages in the State of Pennsylvania?

A. The Pennsylvania practice of making notes containing a warrant to confess judgment, has the strong recommendation of enabling the holder to collect his debt when due without the expense of a law suit; but it also appears to be a convenient instrument by which to defraud other creditors. A man's property may be wholly covered by a judgment note, of which no record exists, and credit may be given him on the strength of his apparent means, which, before the credit expires, may be wholly taken from him, collusively, by the simple entry of judgment with a prothonotary. The means of punishing the fraudulent debtor for this fraud seems deficient, owing to the state of proof required under the statute making the deceit a crime. The first and best and only effectual remedy is to give credit to none but men of established integrity; but if there is any doubt on this point, it would be well to require written representations, containing a special guaranty that the buyer has no judgment notes or mortgages out.

79. W. VA.—A note non-negotiable under the laws of West Virginia, but negotiable under the laws of Ohio, is executed in West Virginia and delivered to the payee, who resides in Ohio. The payee transfers it by indorsement in blank, the holder deposits it in his bank in Ohio which transmits to West Virginia bank for collection. The collecting bank does not protest, holding that West Virginia laws govern in the case, and being non-negotiable, that protest is unnecessary to hold the indorser. Should it have been protested to hold Ohio indorser? Please give authorities.

A. Where a contract is made in one State to be performed in another, the law of the latter would govern as to presentation and protest; but this note was made in West Virginia and to be paid in the same State, hence the laws of that State govern, and the non-negotiable note need not be protested to hold the indorser. Daniel on Negotiable Instruments, vol. I, pp. 657, 658.

PARTNERSHIP.

CAPITAL.

1. A and B have a store in Chicago with a capital of \$50,000. A is also a general partner with C in New York, and the capital of this firm is \$100,000. B has no interest in the New York firm, and C has none in the Chicago store. The Chicago firm becomes insolvent. It

is claimed that every creditor of the New York firm is entitled to be paid in full, before any creditor of the Chicago house can collect from the New York firm.

A. Partnership property must first be applied to partnership debts; if any surplus remains after selling about enough to cover the debts of the New York firm, then A's share or interest in that surplus can be taken and applied to the debts owing the Chicago firm. All that can be claimed by the creditors of the latter of the New York house is A's interest in what remains after the partnership debts are covered.

2. The junior member of the firm is charged with the financial administration, keeping the cash, accounts, etc. Recently he had just prepared his deposit for the bank, and was leaving the office to make the deposit, when a customer came in and handed him \$50 in bills. On reaching the bank he went to a desk to alter the item of bank bills in the deposit slip to correspond with increased amount of same, but on searching for the money found that the \$50 had disappeared, his pocket having been probably picked while gazing at the newspaper bulletin. The senior partner contends that the money should be charged to the personal account of the junior partner; the latter, however, claims it should be passed to profit and loss account. Which claim is correct?

A. This is not the personal loss of the partner unless he was culpably careless, and may be charged as the loss of the firm.

3. A, stockholder, accepts an order from B for certain stock, with security to a certain percentage. Upon the declining of stock, which forfeits the security, A notifies B either to give more collateral or else he would sell out to protect himself. B advises to carry and gives collateral, and so on in three or four more instances. On one occasion, B being unable to procure more security, as the stocks are constantly falling, he gives verbal assurance to A to hold on, as he had ample means to cover any deficiency that might result, if the stock did not recover. To this A consents, until the margin becoming too great, he presses B to make good the difference, which he is unable to do. B is in business with C, and represents two-thirds of the capital and C the other third. Their joint capital is sufficient for their liabilities, but if the law entitles A to seize upon the two-thirds of the business capital of B, C will be unable to meet his obligations. The right of A to sell in the moment the security ceases, does it not constitute an error if he takes no advantage of it, and in the sense of the law will the unsecured margin be considered as a debt?

A. A is not obliged to sell, and he has a good claim against B for the deficiency, but he cannot seize the partnership property

of B & C for the private debts of either partner; and if judgment is obtained and execution is issued against B's estate, the partnership debts of B & C must first be provided for, before there is any surplus that can be applied to satisfy this execution.

4. Two friends of ours, A & B, formed a copartnership with equal capital a year ago, and agreed that A in consequence of having previously established a business, should receive three-fifths and B two-fifths of the profits. They both spend their whole time working for the business, and draw out from time to time, for living purposes, certain sums of money, without having specified in their agreement the amount that each shall draw for such purposes, or that they shall draw any. The question arises: Should the store be charged with a certain sum for services rendered, amount of which they can agree upon, before counting profits? or wanting any arrangement, should the amount drawn be charged to each individual account, and their services go to increase amount of profits?

A. No partner in a house can charge for his services ordinary or extraordinary. What each draws will stand to his debit, to be offset only by profits passed to his credit when any are divided.

5. Suppose four persons associated as partners in mercantile business, each having a different interest (say A 55 per cent., B 20 per cent., C 15 per cent., and D 10 per cent.), purchase real estate in this city. (N. Y.) and receive deeds in the firm's name without regard to partner's interest, would the property be considered as belonging one-fourth to each person, or in proportion to the partnership interest?

A. They would own in the real estate precisely as in all other property belonging to the firm, only their respective interests.

6. Suppose one partner of a concern is in debt to the firm over and above his right to draw money, said party being responsible, how can said indebtedness be collected without dividing the firm? Can one party of a firm be sued by another member of said firm? Could the claim be assigned to a third party and collected by him?

A. An application may be made by a suit in equity to compel a partner to make good a deficit in his account, but an action at law, as a general rule, cannot be maintained against one partner by another until a final accounting is made of the partnership concerns, although an exception was once made in Massachusetts, where the debt was entirely separate from the partnership business. Nor could such a claim be assigned for the purpose of

giving the right of action. There is no question but what the partner has a legal remedy, but exactly in what form we could not decide without further particulars.

7. A friend of mine had charge of a good paying factory. When his employer concluded to get out of business, he and myself agreed to buy machinery, form a stock company and continue business. To facilitate matters I gave a six months' note for \$6,000, in favor of my friend, who had the same discounted in bank, proceeds being placed to credit of his individual account. I received a receipt for 60 shares at \$100, signed by him as agent of this factory, to be exchanged for certificate when ready. It was understood that I would furnish \$4,000 in addition as soon as incorporation papers were obtained. Through my influence I interested another party who furnishes \$50,000 cash; but instead of sticking to the first plan, this party and my friend form a private firm, excluding me from their arrangement. Can my note be forced on me for payment when due? And can I make my friend responsible for damages sustained by being cheated out of the prospective profits of this factory?

A. Prospective profits cannot be reckoned in the claim for damages. But if the factory, etc., were actually purchased partly with the capital, and for the interest of our correspondent, he cannot be excluded against his consent. He will be obliged to pay his note any way.

8. A & B form copartnership for manufacturing purposes. A puts in \$10,000; B puts in \$4,000, his machinery costing \$3,000, and his knowledge of the trade; share and share alike in the profits. Nothing being said about interest in partnership papers, would not A be credited with interest on his \$10,000, and B with interest on cost of machinery and \$4,000, to be deducted from the profits?

A. If nothing was said about interest, the fair inference would be, under the circumstances, that the investments were to offset each other, and no reckoning be made of capital on either side. B's "knowledge of the trade" is quoted as part of the capital, and it may have paid a better interest than the money.

DISSOLUTION, LIQUIDATION, WITHDRAWAL.

9. A and B partners, dissolve their partnership and authorize A to settle all accounts and to use the name of the firm for such purpose. B makes an assignment to C; C then asks A to collect debts, etc., the same as by partnership agreements. Can A in settling accounts due the firm take two notes for each account, one payable to himself and the other one half payable to C, and not render himself liable?

A. We see no objection to this mode of settlement, though if B's note should remain unpaid, and A's should be collected, the latter probably could not retain more than half, unless B's assignee definitely accepted the note as absolute payment *pro tanto*, and not merely as a security.

10. A and B form a private partnership, and business is transacted for ten years solely in the name of A. The firm dissolves and B retires. Neither partnership nor dissolution was advertised. A then forms a partnership with C, continuing the same business, under the firm name of A & Co. This latter partnership was not advertised except by signs upon the building, and with partner's names and the firm's also printed upon all letter sheets and bill-heads.

Is this continuous notice a sufficient protection for B against responsibility for all transactions of the new firm? If not, what would you recommend?

A. If B was not known as a partner, either to the public or to any one doing business with the concern, he cannot be held liable after the dissolution. But every one who knew that at one time B was a partner, has a right to a notice that he has withdrawn from the firm, and if no responsible notice is given, may recover from him for any credit given to the firm on account of his supposed connection with it. In the latter case, if no formal dissolution is desirable, B can advertise four or five consecutive days that he is no longer interested in a certain firm or business, and a copy of this should be sent to any out-of-town or distant correspondent likely to trust the firm on his account. Not long since we recommended this to a retiring member of a firm engaged in the lumber trade, but he was persuaded that it was an excess of caution, as his name had never appeared in the title of the firm, and he did not heed the advice. A dealer in Canada who had known the young man's father, sold the firm, after he retired, about \$12,000 worth of lumber. The new firm failed, the debt was not paid, and our retiring friend had the \$12,000 to pay, the Canada dealer making oath, no doubt honestly, that he supposed the young man was still a partner in the new house, and would not else have granted the credit. Changes in partnerships are not published as fully as they ought to be; and the commercial newspapers do not deal with the neglect as they should, for fear, we suppose, that they may be charged with mercenary motives.

11. How many consecutive advertisements are required to announce the dissolution of a special partnership? and if the same must be inserted in a paper published in the city or town where the business was carried on, in this State (N. Y.)? If no daily is published there, will a weekly or semi-weekly meet the requirements of the law?

A. The statute of New York provides that no dissolution of a special partnership by the acts of the parties shall take effect previous to the time specified in the certificate of its formation or renewal, until a notice of such dissolution shall be filed and recorded in the clerk's office in which the original certificate was recorded, and published once a week for four successive weeks in a newspaper printed in each of the counties where the partnership may have places of business, and in the State paper.

12. A and B, merchants of this city, formed a partnership with Jones of Baltimore, which has been conducted under his name—the partnership being never advertised. This agreement expired on 30th of June last. Will an announcement by Jones, that he is again doing business in his own name be sufficient to protect A and B from any responsibility in his future operations?

A. It will not be sufficient protection. Every man who knew that A and B were partners in the house has a right to assume that they continue such until full notice is given of their withdrawal.

13. A and B (holders) form a co-partnership for manufacturing purposes. They borrow capital from relatives; after becoming somewhat involved, they secure by a chattel mortgage on machinery, etc. After being in business for a time A withdraws from the firm, and fails to give notice of dissolution, and B continues under the firm name.

Can A be held responsible for debts contracted in the firm name, after the dissolution had taken place?

Can B be proceeded against for fraud in using the firm name and obtaining credit thereby, if the concern should prove to have been insolvent at the time A went out?

A. A can be held for all debts contracted in the name of the firm until he gives notice of the dissolution.

The law in this State provides a penalty for carrying on business in the name of a company where no partner is represented by it, unless certain legal forms are observed in its continuance; but as both partners are held to the publ. until notice of the dissolution is given, this might not apply in the case described.

14. A and B's co-partnership expired March 31 by limitation. They have settled up the business between them with the exception of their respective rights as to an invoice dated in Europe April 3, which was for a contract made through a New York agent, C, for account of the old firm. Said invoice is still in transit, comprising some very desirable raw materials, and is claimed by both A and B, who are rivals and continue in the same line of business. A's interest in the old firm was three quarters, B's one quarter. C is now agent for B since April 1. What disposition should C make of the above invoice whether same should be sold at auction or otherwise to highest bidder, and profit and loss divided pro rata as to above interests, or should he recover the goods pro rata to above interests, and should C require the written consent of both or either party, or has he discretion or power in the matter? The old firm has paid nothing to C on account of above invoice. A continues his business under the old firm name, and B under another.

A. C has the legal right under the circumstances to refuse delivery to either party. The equitable way is for A and B to agree, or to abide by a decision of a referee. Failing thus, C may divide the invoice between the parties, if they will consent to receive it in this way, as he may deem just and proper.

15. On dissolution of partnerships, how many papers must the notice be placed in, and for what period, to comply with the law?

A. There is no law requiring any notice to be published. The law leaves it to the parties who are chiefly interested to give such publicity as will relieve themselves from further and future liability in case the partnership name should be used in the creation of fresh obligations. It is regarded as sufficient notice to strangers to insert the facts of dissolution in two or more papers from three to five times; but to save himself absolutely from further liability, the retiring partner should see that a written or printed notice is mailed to every creditor of the old house, likely to be called on to furnish goods or materials on a new credit.

16. A, B, and C commence business, A furnished \$25,000 capital, B \$5,000, C none. A's proportion of the profit or losses is 60 per cent., B's 25 per cent., C's 15 per cent. At the expiration of the term of co-partnership, C is indebted to the business to the amount of \$8,000, and has no financial responsibility, while the amount to the credit of B is but \$1,000. In the settlement between A and B to what extent is B liable to A for the indebtedness of C? and where his proportion exceeds the amount of his credit in the business, can A look to him to make it good out of his private funds?

A. B is bound to make good the loss of the firm by C in the proportion of his contract, and his share of it is \$2,353. He must, therefore, besides the \$1,000 to his credit, pay in from his private funds the sum of \$1,353.

17. A and B form a copartnership for three years, A putting in \$40,000 cash, on which he is to receive 7 per cent. interest per annum. B, who is the business man, puts in no capital but his ability as off-set to A's capital. At the expiration of three years no new papers are made, but the concern is understood to go on upon the same basis. At the end of five years they propose to wind up the concern and divide the assets. Their capital account stands, A, \$80,000; B, \$40,000. A now holds that before B can receive any of his \$40,000 he (A) must be paid \$40,000 cash first, which he put in originally, and B contends that the assets, \$120,000, should be divided pro rata, that is, A to take out \$8,000 and B to take \$4,000, as the assets are realized. Which is correct?

A. It makes no difference whether the money to the credit of each is original capital or laid by from ascertained profits; the latter is as much entitled to a pro rata dividend as the former.

18. A, N, & L were in copartnership and did business for a number of years. L sold out his interest in the business to his partners after a few years, the others continuing the same business. B, a customer of the house when all three were in partnership, failed, compromised and went through bankruptcy, holds a receipt in full and his account was balanced in the books of the concern, by profit and loss, before L sold out. Now B comes up and pays to the still existing firm the amount lost by him. Is the partner who sold out his interest in the business entitled to that share of the money which he lost, or are the remaining partners entitled to the whole amount?

A. The remaining partners, having bought all the assets of the old firm, are alone entitled to the payment.

19. A, B, C, D & E are partners in business having variable interests. Through adversity the concern becomes insolvent. The majority of the partners, however, decide to struggle along, using their credit in the hope of retrieving their fortunes. E dissents, and withdraws from the concern in regular form, the remaining partners assuming all assets and liabilities. E forms new business connections, and is successful. Can he be held liable for any debts of the old firm if after his withdrawal it should become bankrupt?

A. E is responsible for all debts contracted while he is a member of the firm, but not for new contracts made after his withdrawal, provided due notice of this dissolution was given.

20. A and B are in partnership in the cotton factorage and commission business ; B is the managing partner and A resides in a different portion of the State. A sells out his interest to B, who assumes all the liabilities of the firm and continues the business on his own account. Previous to the dissolution there was a shipment of a hundred bales of cotton to D and C, which was drawn on to the full market value, and ordered to be held. At the time of the dissolution there was little or no loss on this venture. B continues to do business with C and D, making shipments and remittances, during which there is a decline in the market and a consequent loss of several thousand dollars before the cotton is ordered sold. A is not informed of the loss nor that he will be held for it. In the meantime A dies and B fails, leaving the indebtedness still outstanding. C and D make claim against the estate of A. Can they recover ?

A. This is a legal claim against the estate of A unless barred by the statute of limitations.

21. A firm doing business in 1869 gave a demand note with interest at usurious rate for borrowed money. In 1872 the firm was dissolved, one member retiring. The business was continued under the new firm name, the new firm agreeing to pay all obligations. Notice of dissolution was given to the creditors and published in the papers. Since the dissolution the holder of the note has periodically presented it to the new firm for payment of interest, accepting and receipting the same from them up to the time of the firm's assignment in 1878. Since failure the holder of the note presents it to the retiring partner for payment, being the first information by the retiring member of his obligation since dissolution. Can the holder of the note now collect from the retiring member ? If so can the retiring member plead as off-set usurious interest paid by the new firm ?

A. The contract was originally voidable for usury if any of the debtors chose to make that plea. It is doubtful if the retiring partner is not released any way by the statute of limitations.

22. A firm composed of four partners, A, B, C, and D, are about to make a change. The capital invested by the respective parties is about as follows : A and B \$150,000 respectively, C \$40,000, and D \$30,000. According to a partnership contract the profits or losses are to be divided thus : D is to get 1-10, C 1-6, and A and B equal shares. The assets of the concern consist partly of merchandise and partly of outstanding accounts (the latter fully equal to all liabilities of the firm.) B is about to retire from the firm, and the question at point is : Is B to get his \$150,000 in merchandise and book accounts according to the interest he has in the business, or is he to get it pro rata to his capital invested ?

A. B is entitled to whatever interest he has in the firm in

cash on the settlement of the firm's estate. If the remaining partners wish to continue the business, they may discharge his interest in whatever form of payment may be mutually acceptable.

23. Suppose a partnership has existed between two parties, carrying on a retail business, say a fancy or dry goods store. One partner eventually sells out to the other, the retiring partner stipulating in writing that he will not start again in that line of business in the same city. In case the retired partner should, some months after dissolving partnership, open a store in the same city and in the same line of business, would he not be liable to an action at law, and could his former partner compel him to vacate the store?

A. There is no doubt that such a contract is valid, and we think may be enforced by injunction, that the injured partner can compel the other to discontinue business in violation of the contract, as well as recover damages for such violation.

24. We sell goods to a firm composed of two members, say to the amount of \$200 up to the time of one of the partners' retirement from the firm, and say \$100 after that time. The only way that we are informed of the dissolution of the partnership is by an advertisement to that effect in a daily paper. Before either bill is paid the partner who continued the business fails and goes into bankruptcy. We prove our whole claim against the estate and get a certain percentage, say 25 per cent. out of it. Can we put this payment toward paying the last bill and sue the retiring partner for the full amount of the purchases before he retired, or must we apply the payment pro rata to the entire account and hold him liable only for the remaining percentage of the \$200? We have never been asked to release the retiring partner, or to consent to the remaining partner's assuming the liabilities for him.

A. If the last sale was made before our correspondent had any notice of the dissolution, even by a sight of the advertisement, he can collect the remainder of his claim against the former partner if he is solvent. If he had, he can still collect the \$200 of that retiring gentleman, unless he has been discharged in bankruptcy.

25. A, B, and C, partners equally interested in a business, propose dissolution, which will take place May 1. They have paid all the indebtedness of the firm. A has a larger sum to his credit as partner on the books of the concern than B or C, upon which he has been allowed interest. A claims that this surplus capital to his credit should

be paid in cash before the merchandise on hand is equally divided between the partners, which is the plan of settlement agreed upon.

Is the claim of A just and right?

A. There is no legal rule applicable to this case, and it is one for mutual agreement. It would certainly seem equitable that before the stock distribution began, the ledger interest of the partners should be equalized.

FIRM NAME.

26. The firm of John Smith, consisting of J. S. only, transacting business with foreign countries, desires to make John Doe a partner in his business; now, is it necessary according to the laws of this State, (N. Y.,) to change the firm name to, say, John Smith & Co.? If not, is John Doe's signature, signing "John Smith," valid?

A. If John Smith is in business in his own name, he may take in one or twenty partners without changing the name, and all of them who are thus authorized, may sign "John Smith" to any form of contract. If John Smith is an old firm name, perpetuated by some one else, according to the legal form authorized in the statute, then, also, new members may be admitted with no change in the name, but the advertisement and other requirements must in that case be repeated every time the membership is changed.

27. In the case of several persons joining together for business purposes under the title of a company, which is neither chartered nor incorporated, does a contract signed as the "company" hold responsible the various persons composing the same?

A. A "company" of this character is nothing more than a partnership of persons in interest. Any contract made by any one of them by authority of the rest, or under an appearance of authority which they have justified by their action or association, will bind each and all of them to the full amount.

28. Smith, Brown & Co., having conducted business for the past 50 years, and all the partners being deceased, the executors close up the business. After the lapse of a short time some of the employees start business, and carry it on under the old firm's name of Smith, Brown & Co., although none of them have that name. None of the heirs of Smith, Brown & Co. object. Can they legally do so, contract debts, sue and recover by law?

A. The firm name may be continued in this State, (N. Y.,)

if none of the heirs or executors of the old firm object, by any of the "assigns or appointees" of the old company, on their complying with the terms of the law as to publication and filing of the certificate.

29. A, B & Co. sell out their business to C. Can C use the old firm's name so that A, B & Co. are not held responsible for any debts contracted by C; and does the mere publication of the transfer of the old business by A, B & Co. to C, release the former from any liabilities contracted by the latter?

A. If C becomes legally qualified to use the name of the old firm (observing all the necessary forms of law), and all who have ever done business with the house are notified by circular or otherwise of the change, A and B would not be responsible for debts afterward contracted by C carrying on business under that name.

30. A, B, and C enter into a copartnership; is it any way conflicting with the laws of this State, (N. Y.,) to do business under the name of two of them, as A & B, or A & C, when they are all general partners, and advertised as such?

A. Either of the above is legal. The law of this State, (N. Y.,) (except to continue a firm name under certain restrictions) forbids one man attaching "& Co." to his name when no partner is thereby represented; and two or more partners having all their names mentioned, are prohibited in the same way from using the words "& Co." after them. But the reverse process is perfectly legal. Twenty partners may lawfully do business under the name of "Jones," or "Jones & Co."; or Jones, Smith, and fifty others may lawfully transact business as Jones & Smith, or Jones, Smith & Co., or use any other style or title for the firm that does not present to the public more partners than are interested.

31. A firm, say John Jones & Co., sells merchandise to different parties; can the debtors, after having discovered the fact that said firm consists of only one member, instead of two or more, take advantage of a certain State law and refuse to pay their just dues on account of the above facts?

A. The laws of this State, (N. Y.,) prohibit a person from engaging in business (unless as a successor in a certain legal

form to some firm legally established) and attaching to his name the words "& Co." where there is no other partner. We do not see how John Jones & Co., (founded and carried on only by John Jones) can bring a suit in court. The names of the complainants would be required, and this would disclose the fact that he was doing business in defiance of the law. How could he stand in court on such a complaint?

32. A is going into business with B in this city (N. Y.). The latter, who is not a resident of this State, is to be a special partner only. Since A is the general partner, can he do business alone under the firm name of A & Company, that is can he (A) open a bank account, bill goods sold by him, and accept time drafts drawn upon him for merchandise consigned, under the signature of A & Company, without making his special partner a general one? I am under the impression that if A accepts a time draft under the title of A & Company, it makes the special B responsible as a general partner.

A. The act of 1866 allowed a special partnership to use the name of one general partner and the words "and Company" to represent the other general partner or partners, provided on some conspicuous place outside the building where the business is conducted, all the names of those interested in the firm are posted up; but this is limited to cases "where there are two or more general partners." One general partner can legally do it, and there is a statute expressly forbidding one person to do business with the words "and Company" attached to his name, under a penalty not exceeding \$1,000 for each offense.

MISCELLANEOUS.

33. A and B, equal partners, have done business many years together, with equal capital and profits. Of late the firm have been running behind, and A has paid in several bequests, making his capital amount to about \$30,000 more than B's. The firm finally compromise with the creditors, leaving a surplus of \$10,000. Should this amount be divided equally, pro rata, or should A take the whole amount, which would not then make their capitals equal?

A. Unless a different result is reached by mutual agreement with reference to the greater sacrifices A has made, the assets gained by a compromise will be shared by both partners alike. The creditors have made this a gift to A and B alike, and both are to share alike in the gain.

34. Smith, Wiggin, and Brown are copartners. The firm fails, assigns as a firm and each partner individually, and afterward compromises for 25 cents on the dollar. Both Wiggin and Brown owe the firm on account, Wiggin contributes all his individual property toward paying the firm's debts, but lacks paying his proportion of the 25 per cent. Brown owes the firm and has nothing to contribute. Smith contributes from his personal estate what is required over and above the firm assets to pay the 25 per cent., and gets up all the obligations. Has Smith any legal claim on either Wiggin or Brown for what he contributes from his personal estate?

A. There does not appear to be any doubt that the payment of a partnership debt which is still a subsisting obligation entitles the payor to contribution from the other partners. An action of account would, however, seem to be necessary in order to enforce the right, and it is not a "legal" claim, in the technical sense, though a good one in equity.

35. A and B form a copartnership business, agreeing to share half the profits and half the losses. At the end of three years the concern fails. Six years before B entered into the partnership he bought some real estate, which stands in his name to-day, and which had no connection whatever with the business of the concern. Now, can the creditors of the concern take or seize upon B's real estate to satisfy their claims? And if so to what extent? I might add that A has no real estate.

A. After exhausting the assets of the firm, the creditors can claim the private estate of either partner to the full extent of their debts. Only the wife's right of dower in the real estate would be exempt.

36. If A and B own real estate, results of partnership, and all of said real estate being in the name of A, who gives to B a "trust deed" to secure his share, does the receiving of such deed invalidate B's realty and make it personalty? If so please quote authorities?

A. A properly drawn declaration of trust under the above circumstances would give B a paper title to the equitable estate previously his as a thing in action. "The equitable estate is the estate at law in a court of equity, and is governed by the same rules in general as all real property is, by imitation. The equitable estate in this court is the same as the land." *Cholmondeley v. Clinton*, 2 Iac. and W., 148; cited, 2 Washburn on Real Property, 4th Ed., p. 489.

37. Suppose a firm be formed with name of John Smith & Co., Smith not having been released from the debts of a recent failure, the Company furnishing all the capital; Smith only gives his name, and drawing salary for same, his name being known to the trade and therefore of value. In such a firm would the Company's interest and capital be liable for Smith's debts?

A. In the case described the assets of John Smith & Co. cannot be taken to pay the debts of John Smith, and the Company runs no risk therefrom. Only the interest which John Smith has in the firm, that is, his share of the assets when the partnership debts are paid, can be taken on an execution after judgment against him. As he has only a salary and no interest, the assets could not be touched.

38. I loan a friend \$10,000 for one year at 6 per cent. interest, and receive his note therefor. My main object is to assist him in a business enterprise, and between us there is this understanding (either written or verbal), that after settlement of note I may claim one-third of what the \$10,000 has made, or I may claim nothing but the 6 per cent. My own circumstances then, and the degree of his success, will determine my action after note is due. Am I incurring liability as a partner should he fail in meantime? I put aside question of usury, and also state that our intercourse through his residence in a distant State will be slight.

A. There does not seem to be the "intention" of partnership in the arrangement thus set forth, although in case of failure a creditor might, perhaps, claim that the money thus loaned should be held subject to the risks of the business.

39. What is customary and right as to copartners' individual accounts? They share equally in the profits of the business, but one account is larger than the other. If interest is charged at all is it right to compound the interest from year to year?

A. The practice is not uniform. Where interest is credited to a partner for his capital it is placed to his credit December 31st each year, and charged, not to the other partners separately, but to the interest account of the firm as an item of general expense.

40. A and C are copartners. Just before the expiration of the copartnership, and during the absence of B, A speculates, loses money, and overdraws the bank account of the firm, which check the bank carelessly pays. Has the bank a legal as well as a moral claim against B (who is the only responsible party of the dissolved firm) for such an overdraft?

A. If the bank had no sufficient reason to suppose that A was using the funds for other than partnership purposes, the claim of the bank against B is just as good as if the money had been duly and properly expended in the partnership business.

41. W. I. John & Company are merchants buying and selling goods: K is one partner, in charge of business; the other partner is non-resident. K indorses a note in bank for his friend W with the signature of the firm, the money being for W's use. Is the firm liable as indorser?

A. Each general partner in a firm has complete authority to use the partnership signature as maker or indorser of a promissory note; and when so used, "the note will be deemed to be made on the partnership account, and bind it accordingly, unless upon the face of the instrument itself, or upon collateral proof, it is clearly established that the party taking it had full notice that the note was drawn or indorsed for purposes and objects not within the partnership business." Story on Prom. Notes, section 72; Story on Partnerships, sections 126, 132.

42. If a party having an established business becomes full partner in another concern also, does this render him liable in case of failure of the latter firm for the debts beyond his capital invested therein? In other words, will the failure of the second concern affect in any way the first one?

A. A general partner in a dozen different houses is liable to the creditors of each, not only to the extent of the capital he invests, but beyond this with any property he may possess. The only distinction is this: the property he has invested in any given firm is held first to satisfy the partnership debts of that firm; and only the surplus will apply to other liabilities.

43. A and B are in partnership, with a written agreement to the effect that B is to furnish a certain amount of capital and share one-third in profits or losses, in consideration for which the writings further express that B is not to be held for more than one-third of the liabilities in case the firm becomes involved.

Would such an agreement be valid (though never published) and protect B against the creditors for any claims beyond such one-third?

Does a dissolution of copartnership—where the business is continued by the remaining partner—release the retiring member from the firm's previous obligations?

A. We answer both questions in the negative. The agree-

ment in both cases only binds the members of the firm, and will not govern the relations of either with the firm's creditors.

44. A and B form a limited copartnership. A puts into the firm \$25,000 and his time, and is the general partner; B puts in \$100,000 and is the special partner. The net profits are to go 50 per cent. to capital and 50 per cent. to labor. The first year's profits are made and are divided as agreed upon. The next year shows losses. How are they to be divided?

A. An agreement to divide the profits of an undertaking equally is considered an agreement to share the losses in the same measure.

45. In the year 1872, a partnership was formed consisting of five individuals, one of which contributed machinery and tools valued at \$15,000, and manufactured goods to the amount of \$16,000 more. Then one of the five agreed to take charge of the business, with the understanding that he was to have a salary of \$3,000 if the profits of the business amounted to so much, and not otherwise. The business was run until the year 1878, and during this time the party running the same borrowed from one of the five individuals, some \$28,000 in cash to pay for goods manufactured, and for machinery and tools for manufacturing said goods. In the aforesaid year, 1878, the party claiming the salary made out his account, charging \$3,000 per year with interest on the same, claiming that there had been sufficient profits since 1872 to pay him his salary, over and above the \$28,000 borrowed money to pay for said goods, etc.

Ought there to be any charge made for the use of the goods, machinery, and tools on hand in 1872, when the partnership was formed, and deducted from the profits of said partnership, said machinery and tools having been used more or less from 1872 to 1878, for the benefit of said partnership, and during that time having depreciated in value by use, as also the goods?

What is the just way of arriving at the profits of said partnership? The party loaning the \$28,000 claiming that he ought to have the money returned to him before the profits can be accurately known, while the party claiming the salary says there are profits consisting of book accounts, goods, including machinery and tools, which have been made since the partnership was formed, sufficient to pay the debt of \$28,000 and his salary. And the party claiming the salary wants to pay the loan of money in the book accounts, goods, machinery and tools, at the cost price, while said goods and machinery have depreciated in value by use since they were made, and it would take some years to dispose of the goods to advantage to pay said loan, besides the risk of bad debts, etc.

A. The equitable way of adjusting the above would be such a statement as a man would make up if he owned the whole es-

tablishment, was running it himself, and desired to see how he stood. He would take account of stock, reckoning tools, goods, etc., at their present fair value, charging off bad debts, estimating good and doubtful debts at the sum likely to be realized for them, deducting his own obligations, and calling the balance profits. If no charge is made for interest on the capital, none should be allowed certainly on the salary not drawn.

46. If one of four partners speculates in his own name outside the firm for his own profit and fails, to what extent, if any, are the other three partners liable for his credits, and how will they be affected by his failure?

A. The other partners are not concerned if their name or funds are not used. When judgment is obtained against the partner (in case he is sued) his interest in the firm, or what would be coming to him after the partnership debts are all paid, can be taken on execution.

47. A and B are partners. C, a salesman, has an interest in the profits, but has no capital in the business. At the time the interest was given him it was so advertised. The firm fails, settles at 50 cents on the dollar, leaving a balance after settlement of \$10,000, which the creditors knew was left. The firm then dissolves. In the settlement is C entitled to 10 per cent. (his interest in the profits) of what is divided? When the firm failed did C fail also? After the failure one of the partners advertises in the name of the firm that C was no partner. Again, the same parties are in business, C with same interest, his agreement to run one year. During the year the firm has a fire completely destroying the building, making a total loss. Does C's interest cease at the time of the fire, or does it run the full time? At the time of taking stock goods were low, but when the fire occurred goods had advanced very high, and the firm recovered \$15,000 more insurance than their stock called for, in consequence of the advance in goods. Is C entitled to 10 per cent. of this profit?

A. "Whether an agreement creates a partnership or not depends on the real meaning of the parties to it as expressed in the agreement itself." (Lindley's Law of Partnership, 18.) This must be understood as applying only to the rights of supposed partners, as between themselves, a different rule prevailing when those of third persons are in question. There may also be a partnership in the profits alone, and not in the property which constitutes the basis of the business. In the latter case,

which is probably the one before us, a balance left after settlement in bankruptcy, or an amount received for insurance on stock, could not, in our opinion, be reckoned as profits to be divided, but must be considered as belonging wholly to the parties who owned the stock.

A partnership agreement would not be affected by a fire unless in consequence of some special clause in the agreement itself. Neither can C be said to have failed individually, when only the firm of which he was a member had become insolvent.

48. Does a release given to one member of a firm for a consideration, release the other partners ?

A. By statute in this State, (N. Y.,) one of several members of a firm, or one of other joint debtors may be released, if the act is specific and reserves the right of action against the others ; otherwise it will operate to release all.

49. Can creditors release one member of an insolvent firm, say the junior partner, without releasing all, and without impairing their claim against the other members of the firm ?

A. The old rule was that a release of one joint debtor operated to discharge all ; but the courts now allow a release to one which includes a stipulation that the other joint debtors shall not thereby be released, to stand as a mere covenant not to sue the party thus favored. The better way is to put it in this form, merely entering into a written and executed agreement not to sue the partner whose release is intended. This will leave the remedy intact against the others.

50. A firm advertises as follows :

Mr. B has an interest in our business from this date.

A & Co.

A & C fail, can B be held for the debts as a partner ?

A. Such an advertisement is usually held to constitute the appointee a partner ; and only in case he can show that his position was that of service, and the interest was merely a percentage of profits in lieu of salary, can he avoid the liability.

51. If one member of a firm buys goods for the use of said firm in his own name, and I am ignorant of the fact that such firm exists until I have a claim against the party who purchased the goods, who can I commence proceedings against for the collection of that claim,

the party who purchased the goods, or the firm? and is the firm holden for any contracts made by the individual member in his name for their use?

A. Parsons on Contracts says: "If the bargain was for a joint purchase and joint adventure, there is at once a joint liability for the original purchase, although it was made by one of the parties alone, and he alone was known to be interested, and credit was given to him alone." Vol. 1, page 173. This is established by many legal decisions. The liability of a partner springs either from his holding himself out to the world as a partner, or from his participation in the business and its profit or loss. Either of these alone is, in general, sufficient to create this liability. *Buckingham v. Burgess*, 3 McLean, 364; *Cottrell v. Vanduzen*, 22 Vt., 569.

52. A and B are partners in real estate business, buying, holding and renting business blocks, etc., acting as manager of the entire business in detail. A and C are partners in general merchandise. A and C having occasion to use a small sum of money, one of the partners banks their note indorsed with the firm name of A and B to the bank and gets it discounted. Before it matured A and C fail. On the maturity of the note the bank protests it and gives A notice of protest. The bank then learns that B knew nothing of the use of the firm name of A and B until after the protests, and claims that he is not holden in any respect. Can the bank collect the amount of note from the firm of A and B, they being solvent?

A. In a somewhat similar case recently reported by us the Court left it to the jury to decide whether the bank had good reason to believe that the indorsement of a firm's name was given by one partner for his own benefit, holding that this being established the other members of the firm were not liable. The jury so decided. That is the point to be settled in the case above noted.

53. Are not all the partners and stockholders of a private bank issuing certificates of deposits payable at no definite time individually liable for all such certificates? Can they be released by the holder accepting interest and extending the time of payment when such bank is closing its business?

A. All interested as partners are liable for the payment. If the creditors accept in place of the certificate the individual obligation of some one of the partners, the others would be thereby released.

SPECIAL.

54. Does a special partner, by holding in the house with which his capital is invested, the position of head bookkeeper, endanger his privileges generally admitted to specials? He signs by procuration.

A. We think that such an occupation would render a special liable to be held as a general partner.

55. A, B & C are partners; B and C are specials. B and C give instructions by which A, B & C lose \$100,000. Can A charge lawfully to B and C the entire loss, he having been opposed to the instructions of B and C? Has A an action against B and C for damages for interfering in the management of the business of A, B & C, of which A under the contract is the general manager and sharing 50 per cent. of the profit or loss?

A. B and C cannot give instructions, or interfere with the management, except by A's consent or permission, the law being explicit on that point, and if A has allowed them to overrule his judgment, and lead him into a business disastrous to his interests, he has only himself to blame. If B and C have on their own motion undertaken any movement or speculation in opposition to A's orders, they cannot bind the firm by their "instructions," and if A has not consented to the order, and repudiates it, the business is theirs, and for their own sole account. The statute allows a special partner to negotiate sales, purchases, and other business for the partnership, but provides that "no business so negotiated shall be binding upon the partnership until approved by a general partner."

56. C enters into a special partnership with D for five years, with a capital of \$10,000, the latter to share one-third of the profit to be ascertained every year. The business was so prosperous in the first three years that C got his special capital back twice in profits. In the last two years, however, through losses, the whole capital of the business was sunk. The question is now, is D individually liable to C for the \$10,000 which he originally contributed to the business, or is the capital at the risk of the business?

A. If by the copartnership articles C was to share one-third of the profits and losses, then as between the firm and its creditors he is liable to lose his \$10,000, that being at the risk of the business, but as between C and D, the former is only liable for one-third of the loss, and D must make up two-thirds of it out

of any property he possesses, unless otherwise provided in the articles of copartnership.

57. Your assistance is asked to define the duties and responsibilities of a special partner. A new point seems to have arisen among the dry goods people as to whether or not a special partner makes himself liable as a general partner if he takes an active part in the management of the business, or even acts as a clerk. Under the law as it originally existed such participation in the management of the business rendered the party liable as a general partner. Has there been any new law which enables special partners to take such a part, and yet avoid responsibility beyond the amount specially contributed?

A. The modified act contains the following section:

SECTION 17. A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management. He may also loan money to, and advance, and pay money for, the partnership, and may take and hold the notes, drafts, acceptances and bonds of, and belonging to the partnership, as security for the repayment of such moneys and interest, and may use and lend his name and credit, as security for the partnership in any business, and shall have the same rights and remedies in these respects as any other creditor might have. He may also negotiate sales, purchases, and other business for the partnership, but no business so negotiated shall be binding upon the partnership until approved by a general partner. Excepting as herein mentioned, he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise. If he shall interfere, contrary to these provisions, he shall be deemed a general partner.

This is too explicit to need further comment or elucidation.

58. A party residing in the city of New York becomes a special partner in a house doing business in a Southern State; has that party a right to assist in purchasing goods for the house without making himself liable as a partner under the laws of this State?

A. The amended law of this State gives a special partner the right to "negotiate sales, purchases, and other business for the partnership, although such negotiations are not binding until approved by a general partner."

59. If a special partner, duly advertised as such, takes an active part in the management of the business, does he by so doing assume the risk and responsibilities of a general partner, or does the amount of his advertised interest limit his liability?

A. The original restrictions upon the special partner have been much modified in this State (N.Y.). He may advise as to the management of the business, loan money to and pay money for the concern, negotiate sales, purchases, and other business for the partnership, without making himself liable as a general partner.

60. Is a special partner's risk only the original sum of his special capital, or, whether under the laws of this State (N.Y.), such a contract implies being obliged to keep this capital intact to the end of the contract?

Example: A puts in \$25,000 special capital at 6 per cent. interest, and one-third share in the result of the business for the term of three years. First year shows no profit. Second year is very unlucky. He loses \$15,000. Is he bound to put in another \$15,000 to make up the original amount to \$25,000 special capital? Or, suppose the result of the second year not only wipes out all his special capital, but brings him into debt to the partnership to the extent of \$10,000. Now, if the partnership is not brought to an end by the failure of the concern, and goes on for a third year, what is A's position then? If the third year shows a profit, can A, being a debtor of the partnership, claim one-third of the profits under the special partnership contract? can he also claim the 6 per cent. interest on the amount originally invested, or, is A obliged to make his loss of \$10,000 good, and also the original amount of the "special" contributions?

Or, A failing to do so, and being possessed of outside means, and the third year, instead of being a successful one, draws the concern still further down causing them to fail, and the creditors make him pay up his indebtedness to the partnership, and over and above this sum, is he also liable to them for \$25,000 special capital lost in the second year, and not made good?

Another question is, which is the correct way of keeping the account? Is it correct to account for yearly interest and the special's profit or loss in the business over the "special capital account," or, is it better to open two accounts, one on which the special capital is credited and which is not changed, and account for interest, profit and loss, over a private account opened in the name of the special partner? The above questions are intended to apply only to the laws of this State.

A. The special partner is not obliged to make good any loss of his capital. He may lose part or all the first year, and the

concern may still go on ; he is not obliged to make another investment. But the statute specially provides that no part of the capital shall be returned to him in the shape of dividends or profits at any time during the continuance of the partnership, and he cannot even draw interest if the payment reduces the amount of the capital. Any loss therefore, making a deficiency in his capital must be made up before he can draw interest or profits. He may make it up by direct contribution ; or, he may leave the account as it stands until the succeeding profits restore it, but he can draw nothing out, under any pretense, unless there is left behind the whole capital intact, until the copartnership expires. It is better to have the special and all that refers to it under one heading, and this will show at any time that the law has not been violated.

61. Can a special partner be held for any more than the amount advertised and put in ? That is, if A contributes \$5,000 to a concern, and in six months time the liabilities are \$10,000, the assets \$2,000, bad debts causing the deficiency, can the creditors demand anything more of A, he having already lost \$5,000 ?

A. If the special partner has observed all the legal formalities, he cannot be held for the debts of the firm beyond the amount he has invested. A large portion of the special partnerships have some legal defect, through the carelessness of the parties and their ignorance of the requirements of the law.

62. Has West Virginia a law entitled "Allowing the formation of limited partnership associations" ?

A. The code of West Virginia authorizes the formation of "limited partnerships for the transaction of mercantile, mechanical, or manufacturing business within the State, and not for the purpose of banking, brokerage, or making insurance." It is formed by certificate filed with the county Recorder, the names of the special partners do not appear, and they are not liable as long as they conform to the requirements of the act. They are not allowed to take any other part in the management of the business than to examine into and advise. (Chap. 100, Code of W. Va.)

63. Are all partnerships, special or general, dissolved by the death of one of the general partners ?

A general partner of a special partnership having died, and no notice of continuance or dissolution having been published, is the estate of the deceased partner held for debts contracted after his death in the name of the firm?

A. Death dissolves all partnerships unless there is a special provision for continuance in the articles of agreement, or the deceased makes such a provision in his will. The death itself is a notice to all concerned. If the executors or administrators without such authority, put or lease funds in the partnership to continue the business they are personally liable as partners, but the estate, as such, is not. The estate cannot in this case be made liable for any new contracts.

64. Is there any law by which a special partnership in the private banking business is prohibited?

A. Special partnerships may not be formed in this State, (N. Y.,) to conduct the banking or insurance business.

SURVIVORS.

65. A & B form a copartnership for five years, and in the meantime A dies; is his widow entitled to a full share of the profits until the time the contract expires?

A. The death of a partner dissolves the firm. Unless there is a provision for such continuance in the partnership articles, neither the widow, heirs, nor administrators can claim the privilege of carrying on the business. The interest of the deceased must be accounted for, and the remaining partners may continue the business as their own.

66. What are the rights of a surviving partner, viz.:

1. His right to insist on selling out the partnership stock, collecting in the debts due the firm, and paying off the indebtedness of the concern, accounting to the executors of the deceased as he goes on, and paying them the cash which accrues after the partnership debts are all paid.

2. His right under the above circumstances, to prevent the executors from selling the interest of the deceased to an outside party.

3. The length of time the law allows for such a settlement.

A. 1. The death of a partner dissolves the partnership, and the partnership property goes to the survivors for the purposes of settlement. They can make no new contracts save in the way of winding up the business. "They have all the power neces-

sary for this purpose, and no more." In a general way all the interested are tenants in common, and the legal representatives of the deceased have the right to interfere if the partnership property is wasted or devoted to any other use than the single one of settlement. If necessary to secure justice to the estate of the deceased, the court will appoint a receiver to conduct the liquidation.

2. The executors, if not otherwise restrained, may sell out the interest of the deceased in the property of the firm, but this will not serve in any way to renew the partnership, or to bring the new owner into the business.

3. A reasonable time is allowed for settlement, and if more is taken the courts may interfere. No charge can be made by the surviving partners for their services in the settlement, nor any new business undertaken with the funds belonging to the estate of the deceased partner.

67. A was the owner of a vessel recorded in the Custom House in his name. B formed a copartnership with A and the vessel became an asset of the firm, each partner being charged with his proportion of her value, but no transfer was made at the Custom House. In case of the death of A and sale of vessel can B give a good title to purchaser? In other words, does the fact of the record at the Custom House not being changed, operate against B in disposing of vessel as a firm asset?

A. The facts of the case being established as above, there would be no serious difficulty in giving title to the vessel in case of A's death.

68. A and B made a contract by which A agreed to take B into his business as a partner on the first of January, A investing \$10,000, with the new firm, to be styled A & B, and receiving therefor interest, and one-half of the profits. The contract contains other details about the manner of conducting the business in general, etc. A died, however, on the 29th of November, leaving an estate of \$50,000, and five children as lawful heirs, of whom two are of age, three are minors, (19, 17, and 15 respectively, years), and who by the terms of A's last will share in his estate in five even shares alike, to be paid to them as they become of age. A few days before his death A made a codicil to his last will, by which he leaves to B the good will of his business, and the use of \$10,000 for the term of three years, as a capital fund to continue the business, B, however, to pay for the use of said money to the estate of A, 10 per cent. per annum, by way of interest and profits. And A further directs that all the provisions contained in the

contract of copartnership entered into by himself and B, and which is to go into effect, on the first of January, regarding said business, shall be of force and effect also after his decease, and he directs B to liquidate his old business. B, as such, receives from the estate of A, the loan of \$10,000, for which he gives his acknowledgment. The two children of A that are of age, demand each from the executor the payment of their one-fifth share of the entire estate, being \$50,000, of which \$40,000 are invested in bonds, and \$10,000 in the firm of A & B, as loan to B. The following questions arise :

1. Must the executor sell enough bonds to pay to each of the children that are of age, their full one-fifth share (or \$10,000) now, or must the two be satisfied to receive at present only one-fifth each of \$40,000, and await the one-fifth of \$10,000, invested with B until he returns the loan after three years ?

2. If B should not make any profits during the next three years to come, what rate of interest will he have to pay to the estate of A for the use of the money ?

3. If B should at the end of three years not be able to return the money in full to the estate, but declare himself insolvent, and continue to be so, will such loss fall alike on all five children, even if the two of age now receive their present share in full of \$10,000 each, or would it fall merely on those being minors to-day, or on those being minors after three years ?

4. Can either of the heirs, or the executor, or the guardian of the minor children raise legal objections against the loaning of \$10,000 to B, as per codicil, and in what manner must they do so to make it effective ?

5. If B accepts the loan from the estate must he pay, in case of profits accruing in the business, one-half of these profits to the estate, as per business contract, or is the contract between him and A a dead letter with the moment of A's death ?

A. The death of A dissolves the partnership. B can claim the good will of the business, but must settle it up without charge, and pay all dues over to A's estate. B can also claim the use of the \$10,000, for the period named, and must pay for it the 10 per cent. only, whether he makes any profit or not from it. The two children of age can only claim each one-fifth of the amount realized, and in the hands of the executors. The \$10,000 will belong to the estate, but will not fall in for dividend until the end of three years, and all the children will share alike interest in it. If B loses it and never pays it, the children will all share alike in the loss.

69. A and B have been in partnership for years without any written articles of agreement with only a verbal understanding, the capital

of each to continue in the firm business without interest, and the profits or losses of such business to be divided according to such verbal understanding, &c. Eventually A dies, thereby leaving B as sole surviving partner, and the latter naturally assumes the settlement of the firm's business. Another firm, C & D, being indebted to the firm A & B, dissolve partnership after the death of A, without having discharged this indebtedness to the firm A & B, with D continuing as successor to C & D. By public notification D settles the firm's (C & D's) business, tendering his (D's) own individual notes, with short time to run, to the order of B. Does B by accepting such individual notes (from D made to the order of B) thereby release the original claims of the firm A & B against the firm of C & D, without any such implied intention or understanding to this effect, certainly on the part of B, until the notes are paid? Also, does B, by reason of having accepted such notes from D, assume any new responsibility, or become legally bound individually accountable to the estate of A for the original claims of A & B against C & D in the case of non-payment of such notes? B has acted in good faith and according to his best judgment as the surviving partner in settling the business of A & B, and has endeavored to account for every cent belonging to the estate of A, as far as collected from the creditors of A & B.

A. If, as we infer from the above statement, D's individual obligation was not accepted distinctly as *payment* of the firm to A & B, it appears to us, in the event of the non-payment of the note, to leave the original note subsisting, and still collectible to the assets of C & D, unless in the meantime it has been barred by the statute of limitations. In this latter case only, therefore, or perhaps also, if assets existed out of which the debt might have been collected at the time the note of D was accepted, and there are now none out of which it may be made, can any question of B's individual liability arise. How it should be answered may depend on the facts not stated above; but if the transaction was, under the circumstances, a prudent one, and apparently for the benefit of A's estate, we do not believe that any personal liability will fall on B.

70. In case of one of two partners surviving and wishing to purchase the business, how many times, and in how many papers must the announcement be advertised?

Can the old firm name be used by the surviving partner, after purchase of the business, provided it has been used ten years previously, although the firm has no foreign connections?

A. The surviving partner has the right to continue the business. As to the partnership property it must be disposed of for

the benefit of the surviving partner and the estate of the deceased. If the survivor wishes to buy out the interest of the latter, he can make an arrangement with the executor or administrator to this effect, as they may agree.

The old name may be continued by the laws of this State, after its use here five years, even without any foreign interest or connections, provided the formalities of the law as to filling the certificates and publishing the same are complied with; without such compliance the use of the firm's name by one partner renders him liable to a penalty.

71. What is the law governing copartnerships where one of the partners dies, the surviving one only having about an eighth interest in the capital and a quarter in the general business? Can the heirs of the defunct partner step in and take all or any control of the business at once? Is there a law defining the time the business can be carried on without allowing the heirs any say in the premises?

A. The death of the partner without any provisions for it in the copartnership agreement dissolves the firm. The heirs in that case have nothing to do with carrying on the business, which belongs to the surviving partner, if he so elects; but he cannot carry it on with the funds belonging to the estate. He must use his own name, or new capital, for any new business.

PATENTS AND COPYRIGHT.

1. Can an article that has been patented in the United States be manufactured in England or France and imported in this country without infringing upon the right?

A. A patent here will not prevent the manufacture and use of the articles abroad, but such foreign goods cannot be sold here. Nor can a patent be obtained for an article abroad by an American inventor who has first made and sold it under a patent in the United States.

2. I have the assignment of a patent to secure the payment of a note; has the assignment to be recorded to make it legal?

A. The assignment will be good against the patentee; but section 4,898 Rev. Stat. provides that "an assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it

is recorded in the Patent Office within three months from the date thereof."

3. My brother-in-law in England wishes me to copyright a book he has written. Will you be kind enough to give me the needed information as how I shall proceed?

A. Unless the author is a citizen of the United States, or a resident of this country, he cannot protect his work here by copyrighting it, as the law now stands.

4. Will you be kind enough to state whether a party who manufactures a certain article and finds afterward that the article is patented, is liable to any penalty if not notified by the patentee?

A. A second inventor has no right to manufacture, if the prior invention has been patented, and is liable to a penalty for infringing the patent.

5. The Government issued letters patent to a certain party, and some months later issued duplicate letters (at least substantially such) to another party for the same article, on the ground of priority of invention. This led to litigation between the parties, or their assignees, and the matter is still in court. Both parties or their assignees are manufacturing the article in question. Can dealers in the article manufactured by the losing party be held liable for damages by the party winning the suit? Can the losing party or his assigns be held for damages by the winner of the suit, or only estopped from manufacturing?

A. The question here raised does not appear to have received an authoritative answer without adjudication; but proceeding upon general principles it is safe to say that it would be highly inequitable to impose damages upon dealers in the case suggested, at all events until after notice that the patent is in dispute. After such notice we should consider it the part of prudence to suspend dealings until the termination of the contest. Whether or no the losing party could be cast in damages would probably depend upon his good faith in obtaining the patent; if so obtained in conscious fraud of another's rights, it appears to us likely that damages might be awarded.

6. Having had a dispute with a friend as to whether one may manufacture for his own use (though not for sale) a patented article, I contending that one had that right, he that they had not, we have decided to leave it to you as an authority.

A. It is just as much an infringement of a patent to make the thing patented for his own use as to make it for sale. The use of a patented article might be, as with a screw machine, the production of screws for sale; of course this would aggravate the damages; but the result would be the same as if it was a washing machine to use in one's own kitchen, or a mower to cut one's own grain. He must get the right before he can make or use the machine.

7. Are patent rights subject to seizure the same as personal property?

A. Patent rights are personal property, and are not exempted from execution any more than stocks or bonds.

8. A fire recently injured my machinery, and among it is a machine for which a patent is held. Can I rebuild this machine without again paying the royalty? A large portion of the machine on which the patent is held is not injured, and will be used again in rebuilding.

A. The owner of a patented machine has the right to *repair*, but not to *reconstruct*. The right to make it sometimes conveyed by the license to use, but if that right has not been granted there is none to rebuild. (*Wilson vs. Simpson*, 9 How., 123.) It will be seen that the answer to the above question depends upon the extent of the work to be done to the machine.

9. A owns a patent on an article used largely by B and all his competitors in manufacturing a certain class of goods. Said patent has been running for some years and has been used by nearly all without paying royalty. Can A now sue B for damages and also oblige him to pay a royalty in future, and let his competitors go on as before, thus obliging B to stop making the article, or is he obliged to treat all alike? The infringement is so palpable that difficulty of detection would be no reasonable excuse.

A. In permitting general use of his patent without action to prevent it, the patentee indicates an intention to abandon it, or, in the language of Judge Story, affords "a very strong presumption of such an actual abandonment or surrender." (*Wyeth vs. Stone*, 1 Story's Rep., 273.) Probably, in the case above presented, the patentee could not recover damages; but as to his right to prevent the future use of his invention without payment of

royalty, it would be unsafe to give an opinion without more specific evidence, such as would have to be produced on a trial.

10. How long will a patent run ?

A. The patents granted protect the inventor for 17 years, unless he has obtained a patent abroad, in which case the patent here expires at the same date as the foreign issue, but not to exceed the period stated. When sufficient reason can be shown, Congress may order an extension of the term.

11. Can I apply directly to the Patent Office at Washington, or will I have to apply through a solicitor of patents ?

A. There is no legal necessity for the employment of a solicitor, if the inventor can draw his own papers. He must first apply to the Commissioner of Patents, in writing, setting forth in "full, clear, concise, and exact terms" a description of his invention or discovery; if it is a compound, showing how it is compounded; if a machine, then he must furnish drawings, and ultimately a model of it.

12. A contracts with B to manufacture under B's patents. After paying B considerable money as royalty, A threatens to sue B to recover that money, on the ground that the patents are invalid. If they are proved to be invalid can A recover? If A can examine the patents previous to the contract, and had been satisfied that they were valid, would that alter the case ?

A. In *Saxton v. Dodge*, 57 Barb., 84, 114, it was held that disputing the validity of a patent was a proper defense to an action or a note given for license fees under a patent; so if money was paid for a license to manufacture, and this was found to be valueless, we see no reason why it should not be recovered. The case submitted appears to us to be one where there is a mutual mistake of fact, viz., as to the validity of a patent; and "money paid by a mistake of fact which causes an unfounded belief of a liability to pay may generally be received back." (Parsons on Contracts, 1, 466, and cases there cited.) A's examination of the patent before contract, and his conclusion that it was valid, would only increase the strength of his claim to recover back the money paid, as it would only serve to show that his mistake was not the result of want of diligence in endeavoring to ascertain the facts.

13. Can an article manufactured in Europe on machinery which is protected by a patent in the United States (but not in Europe), be imported and sold in this country; or would this be an infringement of the American patent?

A. It would be an infringement of the American patent.

14. Must all patented articles have the patented mark thereon?

A. The act of Congress makes it the duty of all patentees, their assigns, and all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented, either by fixing thereon the word "patented" together with the day and year the patent was granted, or when from the character of the article this cannot be done, by fixing to it, or to the package where one or more of them is contained, a label containing the like notice.

POWER OF ATTORNEY.

1. Is it legal for a person who holds a power of attorney to sign another's name, to do so without affixing the writer's name as having legal authority to do it?

A. This question has been widely discussed, some contending that only instruments not under seal can be executed properly without the added name of the attorney to show that it was done by another under proper authority. Lord Ellenborough (in *Watkins v. Vince*, 2 Stark., 368), held that the signing of the principal's name by an attorney duly authorized to contract in his behalf, was a sufficient signature. Where the principal is present, there is no doubt about it, but in absence of the principal, as the deed takes effect only from the act of the attorney, it is always better to add the signature of the latter.

2. Does a general power of attorney cease to be in force at the death of the party who made it?

A. The death of the principal operates *per se* as a revocation of the power unless the agency is coupled with an interest in the thing itself on which the power is to be executed, as a warrant of attorney to confess judgment and the like.

3. A some years ago executed a power of attorney to B, a lawyer, for the purpose of collecting certain moneys due to A in a foreign

country. B transferred power of attorney to C, a personal friend of his, but a total stranger to A. A was notified of the fact and made no opposition. For nearly four years A was unable to obtain any information in regard to the matter, nor can he now learn anything from B in regard to collection, but A has positive information that C collected the amount at least three years ago, and has thus far failed to account for it—so B claims. Can B be held responsible to A in any form?

A. "The employment of sub-agents or substitutes is often expressly provided for in letters of attorney and other formal instruments. In such cases it is clear that the original attorney or agent will not be liable for the acts or omissions of the substitute appointed or employed by him, unless, indeed, in the appointment or substitution he is guilty of fraud, or gross negligence, or improperly co-operates in the acts or omissions. In many other cases a similar authority arises, by implication, from the conduct of the parties, or from the usage of trade."—Story on Agency, 201. The circumstances of the above case create such a presumption that, unless there is some evidence of B's dereliction, it would appear to be the proper course to hold C directly to account.

4. Andrew Brown holds a power of attorney from John Jones & Co., and signs a check thus: "per pro. John Jones & Co., A. B." The bank upon which this check is drawn contends that Andrew Brown should sign his name in full, otherwise the signature is not complete.

A. The signature should correspond with the power of attorney. If John Jones & Co. have given such power to "A. B." then A. B. can draw the money; but if the power is given to "Andrew Brown," then neither A. B. nor A. Brown can properly exercise the power. It must be "Andrew Brown," as in the document.

5. How should a person holding power of an attorney sign?

A. The question as to how an attorney should sign is not simple, and the answer is governed by the terms of the power itself. A man may be authorized to sign the name of the principal in such language that he need only sign it, without adding his own name at all; but if he is authorized to do a certain act or deed "as attorney for" the principal, then he must sign the

principal's name "by A. B., his attorney." The latter is the better way in nearly all cases.

6. Can not the attorney of a firm be authorized by the firm to sign the firm name without any appendix showing the signature to have been made by procuration, if he has not a partner nor has any interest in the firm besides his salary? In other words, does the signing of the firm name alone necessarily imply partnership, or is it merely another form of signing per procuration?

A. The attorney of a firm may sign the firm's name without attaching his own if he has sufficient authority. In *Morse v. Green*, 13 N. H., 32, it was held that "if a party authorized another to subscribe his name to a note the fact that the signature was placed there by an agent need not appear on the note." The only risk run by the attorney is that in signing the firm's name in this way he may thereby hold himself out to all who witness the act as a partner and be treated as such in case of the firm's insolvency.

7. I hold full power of attorney for John Doe. Does said power cease in case said John Doe should be placed in an insane retreat, when he has not annulled my power of attorney?

A. This question has not been settled in all its bearings, but it was said by our Superior Court, in the case of *Wallis v. Manhattan Co.*, 2 Hall, 495, that "the mere existence of lunacy never operates to revoke a power until the fact is judicially established by proper proceedings in chancery." In *Kent's Commentaries*, vol. 2, p. 645, it is further said: "Insanity does not operate as a revocation of a power coupled with an interest, nor if the agent acts under a written power, or a previously acknowledged authority, and the insanity be unknown to the party."

PRINCIPAL AND AGENT.

1. I will be obliged for your opinion whether in the case of a commission merchant and his client, and the former has by desire effected an insurance on the latter's property or consignments of produce, has, according to the custom of the place, charged to his client the rate of insurance published by the company (which is a mutual one), but has actually paid only in cash such rate, less 15 per cent. rebate, allowed to all insurers (at their opinion, instead of waiting to participate in dividends) when the transaction, be it by account sale or account stated,

and settled or not, is disclosed to the client in its actual colors, can the client recover the overcharge from the merchant or not, and whether in New York or elsewhere? and are there any, and if any, what, reported cases bearing on the subject, in the New York courts?

A. If the rebate were distinctly accounted for to the client, and retained by the commission merchant as a charge for his own trouble, the transaction would, no doubt, hold water; otherwise it would violate a well settled rule of law governing the relations of principal and agent. The nearest case in point, in the New York courts, was the decision of the Supreme Court in *Minnesota Central Railroad Company v. Morgan*, 52 Barb., 217, where it was held that the custom of agents to appropriate insurance scrip dividends is not admissible. Story says: "No agent will be permitted * * * to hold any profits incidentally obtained in the execution of his duty, even if it be sanctioned by usage. Such a usage has been severely stigmatized, as a usage of fraud and plunder." Story on Agency, sec. 207, and authorities there cited.

2. A is a merchant going to Europe, and gives to a person, B, during his absence, power of attorney to sign checks in payment of bills of the firm, which checks A's clerk, C, brings to B for his signature. Instead of paying the bills, the clerk C, gets the checks cashed at the bank, and puts the money in his pocket. Is B legally bound (he not having taken the trouble to get receipts for the checks he signed) to make good these amounts?

A. If B & Co. were both in A's service, unless further negligence appears on the part of the first named than is described in the above statement, we do not think that B can be held to make good C's default.

3. A, residing in New York, telegraphs B, his correspondent residing in St. Louis, "Purchase and ship for my account 500 bales even running middling cotton at 10 cents f. o. b." B replies: "Order executed and cotton being shipped." When B receives the cotton 100 bales are rejected for cause, mixed and falsely packed, etc., and meanwhile the market has advanced. Can A demand of B that he shall supply the 100 bales of like grade, even though A had placed the purchase at Liverpool?

A. If B shows no negligence in the matter, we do not think that A can require him to make up the deficiency. If instead of buying a specific lot of cotton B contracted for the delivery of

500 bales of the quality and condition specified, he can insist upon the sellers in St. Louis fulfilling their engagement.

4. If I hire a salesman on commission, giving him one-half profits on his trade or sales, and (in order to guard against sales that might be made for the commission) agree that he shall stand half the losses, and pay him 1 per cent. for collecting the bills, every week, together with the amount of commission due, is he a partner? That is, if he collects \$400 or \$500 and makes no return, is he not subject to criminal prosecution?

A. An arrangement of the character described, if all the facts are stated, would not constitute the salesman a partner. But if he were authorized to collect money, and paid a commission for doing it, a little delay in turning over the money might not have warranted his arrest.

5. Is there any way to give any one an interest in the profits of a business, without at the same time giving him any of the rights of a partner?

A. A clerk who receives a certain stipulated percentage of profits for his services in lieu of wages, is not necessarily a partner, and without further agreement has neither the rights nor liability of a partner. Or one may become a special partner by publication without any right to interfere in the management of the business.

6. A question arose, if a man in my employ who has no salary, but only an interest in the profits of my business, can he be considered my partner?

If he has no salary, but has to share profits and losses, is he my partner?

His name don't appear in the firm in either instance.

A. A person who is held out to the public as an active partner in the firm, can be held responsible as such by third parties, no matter how he is paid. But "it is well settled that a contract to pay one employed in a certain business a salary equal in amount to a certain proportion of the profits, will not make such a person a partner." *Miller v. Bartlett*, 15 S. & R., 137; *Stocker v. Brockelbank*, 5 E. L. & E., 67; *Hodgman v. Smith*, 13 Barb., 302; *Parsons on Contracts*, vol. 1, page 162.

If the one thus employed has to share losses as well as profits, he would seem to be a partner; but even here, as between the

man and his employer, this may be regulated by agreement, so that the former would have no further privileges as a partner than are named in the contract.

7. Is there any statute law for the punishment of persons employed by merchants, who take a percentage from sellers unknown to their principals, upon the amount of goods they buy from time to time?

A. There is no statutory penalty for the breach of duty specified, but the principals can recover for their own any such percentage received by their unfaithful agents.

8. We give to one of our workmen a percentage on gross amount of sales in lieu of all other compensation for his services. We sell our goods packed in boxes and barrels, charging for same, with the understanding with the purchaser that they (the boxes and barrels) can be returned and deducted from bill. Should the amount of boxes and barrels be deducted from gross amount of sales, it being understood they were to be returned, when sold, and amount paid on them as a deposit?

A. The expenses of packing, etc., even if the boxes were not credited on their return, would not form part of the gross amount of sales, on which a salesman could collect his commission.

9. I made arrangements with a New York commission house to sell their goods in Boston, they to allow me a certain commission for selling, I paying all my expenses. They have just rendered me the first account of my sales, and have only allowed me commissions on the net amount, deducting 5 per cent. from each sale. Nothing was said at the time of making arrangements, if the commission should be on the net or gross amount. I claim that they have no right to deduct 5 per cent. I sell the goods for a certain sum named by them, and if they allow 5 per cent. for cash that is not part of my transaction. I claim that if I sell the goods for 45 cents per yard, I am entitled to commission on what that amounts to.

A. In the absence of any agreement or understanding to the contrary, the commissions ought to be reckoned on the gross amount.

10. Is a foreign agent selling American produce, cost, freight and insurance, entitled to his commission on the gross amount of invoice, or only on said amount, freight being deducted therefrom?

A. His commissions are charged on the amount collected of the buyer.

11. When a buyer for an importing house, whose duty it was to buy goods in Europe, and who received salary for his services and all expenses paid, severs his connection with the house, is he entitled to take with him the correspondence between him, in the capacity of buyer, and the manufacturers in Europe, letters from his house here, memorandum of purchases, copy book for his orders and letters, price lists, etc. ? or are these the property of the house that employed him, and can the house legally claim them ?

A. Everything of this character that has come into the possession of the house through him, is the property of the house, and the latter can legally claim it.

12. Suppose an *employee* of a firm or institution is hired for one year from say February 1. His year of service expires and nothing is said on either side in regard to a re-engagement, but the *employee* continues to perform his duties promptly and receives his salary regularly for several months or even years longer. Is the employer bound for his salary to February 1 of each year, or may he dismiss his *employee* any time during the year ?

A. Where a clerk is engaged for one year, his term of service then expires, unless it is renewed directly or by implication. How far his retention in service may be considered a positive renewal of his engagement will depend on the circumstances of each case, and there is no positive rule applicable to such cases.

13. A family hire a young woman for general help in the house. The first month they do not find her as capable as represented ; she was unwilling to take directions, or to do the work as the family wanted. Hoping she will improve they go on the second month. She becomes more wilful in neglect of what is wanted, is impudent, and the family tell her that if she will not do as requested, she can leave, and offer to pay her for the past month. She wants her full two months' wages. Does the want of disposition and ability to do her work satisfactorily to the family give them the right to discharge her and pay merely for the time she has served ; or has she the right to her full two months' pay, without regard to how she behaves or does her work ?

A. She can collect her two months' wages, as the law is now administered in our minor courts.

14. If an employee engaged on weekly salary declines to work on a legal holiday, can he compel payment for such day ?

A. A man engaged by the week at a weekly stipend must do on every day of the week, Sundays included, the work necessary

and proper to be done in the line of his vocation. The farm laborer is expected to feed the cattle and milk on Sundays as on other days, and must harness the horses, etc., and drive his employer's family to church if that is in the line of his duty. If it is necessary or proper for a clerk or other salaried person to work on a legal holiday, he cannot demand the pay unless he performed the duty.

15. Suppose A hires B January 1st for one year. On July 1st A notifies B that unless he is at business at 8 A.M., he will be fined two cents per minute after that time. Can this fine be deducted from B's salary?

A. The employer cannot enforce a fine of this character, it being in the nature of a judicial proceeding to recover damages. But if the employee fails to keep proper hours, and the employer should discharge him, the fact could be set up as a defence against any action for breach of the contract.

16. A lawyer agrees with me for a certain amount of money, which is paid him, to search the title and collect other matters of interest concerning an estate. Arriving at where the estate is situated he finds he has no time to remain to investigate it, as it will interfere with his other business, and he places the matter in the hands of another lawyer who is acquainted with the case, and on his return informs us to that effect. After a while lawyer No. 2 sends No. 1 a letter, giving his opinion of the case, and requesting \$25 to commence suit, or \$5 for his trouble. No. 1 gives us the letter and requests the money, but as there was an agreement between us that there were to be no other charges than as above mentioned unless we realized something from the estate, I refused (for the information was not at all satisfactory). Requesting my papers, title deeds, &c., which I had furnished him and which he left with lawyer No. 2, he refused to return them unless paid the required \$5. Can I compel lawyer No. 1 to return those papers? our business was with him and not with the one whom he employed to do his work, for which he was paid; and in the event of his still refusing to return the papers, what method can I adopt to compel him to return them? or will it be necessary for me to furnish him with \$5, that he may forward it to his lawyer, that we may get the papers?

A. If there is no loop-hole in a correspondent's agreement with his lawyer, and it is a binding contract to the effect above stated he has nothing to do with the demands of the second lawyer, and can get back his muniments of title without paying the \$5 demanded. But it would be in the highest degree hazard-

ous for us to give a positive opinion of this kind, or any other, without the written agreement, if there was one, before us ; or if there was no writing, without a close examination of the witness, in order to know precisely what he could swear to. And unless our correspondent is very sure that there is no flaw in his contract, or his means of providing it, no doubt it would be cheapest to pay five dollars.

17. A enters the service of B under a contract to receive in lieu of a salary a fixed commission upon all the sales of the house. Upon the termination of the contract the question arises upon what A is to charge his commission. A claims that he is entitled to commission upon all orders which have been taken and accepted by the house without reference to whether or not the goods have been delivered and charged. The question seems to resolve itself into this : When has the sale been so far effected as to entitle A to his commission—when the orders have been taken in good faith and accepted by the house, or when the goods have been charged up and delivered ?

A. Where a salesman is allowed a commission on whatever he can sell, he is entitled to charge it on all the accepted orders he may bring in, no matter when they may be charged or when the goods are to be delivered. But one who has a given commission on all the sales of a house for a certain year, or period of time, can only reckon it on the amount entered in the sales book for that limit of time. He would demand it on the earliest sales written in the book, after the date of specified beginning, although the orders were taken before, and he could not claim it on sales not yet entered, although the orders were on the file to be executed.

18. A agreed with a certain party to sell goods for the same against commission, without specifying in the original agreement whether the commission was to be paid on gross or net amounts. The goods were sold on regular dry goods terms, say 5 per cent. 30 days, 6 per cent. 10 days. The party for whom the goods were sold, claims, when settlement is made at the close of the season, that he ought to pay commission only on the net amount of the sales. What is the mercantile rule in such cases ?

A. The rule is to reckon commission on the amount actually charged to the parties who purchased the goods, and which they were expected to pay.

19. Previous to first of January a jobbing firm in this city re-engaged the services of an assistant who had for some time previously been employed by them in the double capacity of buyer for one of the departments of their business and general salesman. The re-engagement was for the whole year and was for aforesaid assistant to be buyer of said department. That his usefulness as a general salesman was to continue was at least mutually understood, but was treated as a matter of secondary importance. Recently the employer, by the exercise of authority, has prevented the employee from performing his duties as a buyer, and does it solely himself at present. At the same time he instructed employee to devote himself for the remainder of the year to sales, as he would either buy for the department himself or procure some one else to do it. Employee simply demurred. In reply he was told that he had no cause for complaint as long as his salary was regularly paid. Employee suggested that the contract called for more on employer's part than the mere payment of money, as his reputation as a buyer and his general standing in the trade were liable to be injured by such action on his part, as well as loss of experience by being prevented attending to his duties as the contract called for on his part. It is not alleged that employee has been either negligent, incompetent, or unfaithful. Under these circumstances the questions proposed are. What can employee best do? Is he obliged to do as employer says under pain of forfeiting salary, or can he maintain the position intrusted to him for the whole term of the contract? Failing which on employer's part, can he treat it as a broken contract and recover salary to end of year without rendering further service as salesman alone, so long as they refuse to permit him to serve as buyer and salesman?

A. As the contract was not apportionable, so much time and pay as buyer, and so much additional as salesman, it must be held to its indivisibility. A distinct engagement to employ a person to render a particular service is not fulfilled by an offer to give the same pay for other work in lieu of it. If the person hired is therefore refused the opportunity to perform the service according to his engagement, he has the right to treat it as broken, and no longer binding on him in any of its parts. He must offer to perform the work undertaken, and being refused, must do his best to obtain a re-engagement elsewhere. He can then sue for the loss he has sustained during the year.

20. Mr. A, stranger to us, solicits the privilege of taking orders for our goods while canvassing for other houses. He sends several orders, which we execute and send our invoices to the customers. In the course of time we are informed that our bills have been paid to Mr. A, who receipted in our name, but without having authority from

us to collect. Have we recourse upon the parties to whom we sent the goods, or upon Mr. A ?

A. Where the selling agent has never had possession of the property, and no authority to collect has been implied from the previous dealings of the parties, the rule of law would be against the right of the agent to collect. The difficulty is that in the local courts at the West these cases are very likely to go against the creditor, on the ground that houses which intrust an agent with samples to sell, and recognize him by filling the orders he obtains, ought to be held responsible for his honesty, and if he collects the money for the goods in their name, even without their authority, they ought to suffer the loss. This is not the rule of law, but it will be found very difficult to enforce the latter against such a strong public sentiment prevailing in the rural districts.

21. A and B own adjoining town lots here. A employs C, an irresponsible party, under contract to cut trees standing on his lot, which fall upon and injure B's house. Is not A liable to B for all damages sustained ?

A. Where work is done by contract, and the employer has no control over the manner of its execution, he is generally not liable for damages ; but we doubt if the above case could be made to come under this rule, and think that if the damage can be shown to have been the result of negligence A may be held liable.

22. Two or three months ago I hired a man on the dock for two or three hours to truck on handtruck some bales for me. In heading up one of the bales from his truck it struck another bale (which had been headed up previously) and knocked it down. On the other side of the bale which was knocked down was a man (who was employed by the captain of the boat which received the bales) in a stooping position, trying to arrange some bales so he could load the boat. The bale fell upon him and broke his leg. He has commenced suit against me, claiming \$5,000 as damages, charging carelessness on my hired man's part. Does the law hold me responsible for the acts of a man temporarily in my employ ? And if I can prove such falling of bales to be a common occurrence, which every one working near them should be on the lookout for ; also that I employed this man because I knew that he understood the work, and had always found him a careful man, have I a good defense ?

A. An employer is liable in damages for the negligent act of his servant, done in the course of his employment, unless the negligence of the party injured contributed in producing the injury. If the exercise of ordinary prudence would have saved the man from a broken leg he cannot recover damages; but we have some doubts whether the vicinity of cotton bales in process of being handled can be shown to be dangerous enough to sustain this defense in the case of one whose vocation called him into the position he was occupying near them.

23. How far does the liability of a principal as to the acts of his agent extend? If an agent exceed instructions in making a contract, can the principal be held, always supposing that the other party to the contract does not know to what extent the agent's powers are limited?

A. The principal can be held to a third party for the act of his agent within the scope of his apparent authority without regard to the limitations the principal may have privately placed upon it. But where the agent has no apparent authority except such as may be in writing signed by the principal, third parties contract at their own risk if they do not acquaint themselves with the extent of the agent's powers.

24. Three years ago, while I was in Germany, my present employer, an importer of this city, offered me a situation through his agent there. I accepted it, and on my leaving for this country the agent paid me, for the account of my employer, a sum of money in order to enable me to make the voyage. Neither on my arrival nor afterward during these three years did my employer ever request me to pay him back said sum; nay, he never hinted at it. Recently, however, at only one day's notice he withdrew said sum from my monthly salary. Has he any right to do so?

A. The answer turns upon a point to which no reference is made in the statement. If the money advanced was a free gift the giver cannot recall it, and now charge it to the beneficiary. But if it was an advance with no agreement that it should be a gratuity, the employer has the right to make the clerk account for it, and to deduct it from his salary however inconvenient it may be to our correspondent.

25. What is the law with reference to the powers of department buyers in binding their principals in the placing of orders for goods to be delivered at some future day or season? For instance: In dry

goods jobbing houses, are such orders binding without the signature of the firm they (the firm) not being privy to the transaction? Assuming your answer to be in the affirmative, would a circular sent to factors and agents notifying them that "all orders placed by heads of departments are not binding without the signature of the firm to each order," be held good in the future?

A. Parties are bound by the act of their agent on either of two grounds. One of these is that they have given to the agent express authority to perform the act for them; the other is that by their own words or acts they have justified the belief of others that the agent had this authority. Houses who send a buyer or clerk in their employment out to make purchases and contracts for them and invariably accept the same without question, will very soon be liable to all who thus deal with them for whatever the agent may do within the scope of this apparent authority.

A notice, such as is suggested above, if duly served, will counteract this presumption, and after such notice dealers rely on his representations as to his authority at their own peril. But even in this case, if the firm has authorized a special purchase or contract, and this can be established by legal proof, the principals are held by the order of the agent precisely as if they had subsequently confirmed it themselves.

26. We hire our help in month of April, and it is understood that we are to keep them for one year, and they are to remain in our employ one year, wages paid weekly. Now what we want to know is this: If on account of dull times, we are compelled to stop our machinery on an average of two days in the week, and have no work for the employees, are we legally bound to pay them full time, work or no work? No agreement was made, or nothing said to that effect at commencement of the year.

A. If the contract was absolute for a year, and the laborer presents himself for work, the employer is bound to pay him, whether he has work for him or not. There should be so good an understanding, however, that a readjustment is possible although the year has actually commenced, if the contract was for full work, and this cannot really be furnished.

27. A is Brooklyn salesman for B & G, and sells goods of a different line for C, on 30 days, to F, a grocer. At the expiration of said time C's collector called on F for amount due, and is informed that A

had collected it, after informing F that he had authority from C to collect, and since that time A has disappeared from the city, and as A was not authorized to collect by C, cannot C collect it from F, or must C lose it?

A. "An agent employed to make, or negotiate, or conclude a contract, is not, as of course, to be treated as having an incidental authority to receive payments which may become due under such contract." (Story on Agency, sec. 98.) Such an implication may arise in some cases from usage, or the previous dealings of the parties, but not from the statement of the agent himself, unsupported by such circumstances. It has been held in some cases that a power to sell goods includes a power to receive payment, at the same time, on the sale, but other cases hold that this authority does not extend to receiving payment at a subsequent time, unless there be some other proof of it than a mere power of sale. (*Seiple v. Irvin*, 30 Penn., sec. 513; *Low v. Stokes*, 32 N. J. [Law], 249.) In *Higgins v. Moore*, 34 New York, 417, the New York Court of Appeals held that a broker commissioned to sell grain, and who, as in the above case, represented that he had authority to receive payment, was not so authorized, though the referee found that such a course was justified by mercantile usage in New York. The Court refused to allow the usage to control, the decision being based mainly upon the ground that the broker had not possession of the property. For this reason the decision seems to apply to the case of the commercial agents, who merely carry samples, and we should consider it good authority against the right of such agent to receive payment, without express authority, or authority implied from previous dealings of the same sort without objection.

28. Has a man to work on the Fourth of July, Thanksgiving, Christmas, New Year's, and Washington's Birthday, and to do chores on Sunday, if he works on a farm by the month for one year?

A. The above is evidently from a laborer or his friend. We answer that a man who engages to work on a farm is bound to perform all necessary service on Sundays and holidays. The cows must be milked, the stock fed and watered, stables cleaned, horses groomed and harnessed (if the family must ride to church or elsewhere), wood brought in, fires kindled, paths cleared of

snow, and such other duties attended to as cannot well be neglected. This is understood to be part of the contract when one engages by the month for such service.

29. One of our traveling salesmen takes an order on credit from a firm in Missouri. On face of this order, under signature of the purchaser, our salesman writes "accepted, goods to be shipped at once," signing our name thereto. Under the laws of this State or Missouri would we be liable for damages (if any could be proven), were we nevertheless to decline to fill said order?

A. If the salesman had no real or apparent authority to confirm a sale until it was approved by his principal, such an indorsement would not legally bind his employers.

30. We manufacture cotton yarn and are merchants. A party claiming to represent a wholesale house calls to sell us a bill of goods. We tell him we will give him an order if he will take our yarn in payment for the bill at a certain price. He agrees to do so. We give him an order. In due time the goods arrive. We write to the agent (who is known to us personally and in a neighboring town) that the goods have arrived and the yarn is subject to his order. He directs us to ship to A B one bale of yarn, which is worth about one-fourth our bill with his house. We do so, and wait for further instructions regarding the balance; hearing no more from him we write to him, but have no reply. We then write to the house direct in Philadelphia. They claim that they had no such trade, and refuse to allow credit for the bale of yarn sent to A B, or to take yarn for the bill. The agent personally is insolvent; so is A B. How are we to settle this?

A. If "the party claiming to represent" the wholesale house really was the authorized agent of such house, the case in law and equity is very clear, and the sellers of the goods can be held to the contract. But if, as appears likely from the narrative, the agent acted without due authority, his claim having no proper foundation in fact; or if he was an agent, but there is no available evidence of this claim, our correspondents are in either case without redress. They must pay for the merchandise and lose the yarn.

31. If our salesman takes an order for goods at a lower price than authorized, are we compelled to fill the same, or are we liable for damage in case we decline to do so?

A. The salesman having general authority to transact the business in question, any private instruction as to price would

not affect the validity of his sales, and the firm is bound by his contract, and must either fill it or pay damages.

32. If we do not choose to fill any order taken by our salesman for any reason whatever, are we legally holden for damage ?

A. A traveling salesman who solicits orders for a commission, and is not held out as the special agent of a particular house, would not necessarily bind the latter to execute his contracts; but for one who is in the regular service of a firm, and so presented to the public, the principals are as much bound within the scope of his apparent authority as for their own undertakings.

33. A buys through B, who is a broker, from C, who is agent for D, who is a manufacturer, 100 barrels of merchandise for future delivery. Three days after C has confirmed the sale, and B has given certificates of purchase and sale to A and C, C notifies A that as D would not confirm the sale the goods would not be delivered. From whom is A to claim damages in case of non-delivery of the merchandise ?

A. If D gave to C as his agent real or apparent authority to make the contract in question, then he is bound by it, and cannot thus repudiate it; or if he does, can be made to respond in damages for its violation. If C had no such real or apparent authority, then the contract is void; but if, through his undertaking in excess of his lawful authority, he has inflicted any loss or damage thereby on A, then C can be held liable to A for whatever he may suffer directly from the failure.

34. Is there any law in this State which renders necessary the giving of notice to quit as between an employer and domestic servant, who is hired (verbally) by the month; and if so, will you state its provisions ?

A. "A hiring at so much a day, week, month or year, no time being specified, is an indifferent hiring, * * * and is determinable at the will of either party." (Wood's Master and Servant, 272.) We know of no New York statute changing this rule; but generally speaking our civil justices are a law unto themselves in disputes between employers and their servants, the former having little chance where there is any sort of a leg for the servant's case to stand upon. It is therefore

wise to give a notice that will be accepted as sufficient by the servant, or to have some agreement before witnesses concerning the termination of the contract.

35. A needy borrower applies to the treasurer of a savings bank, who is also its attorney and counsel, for a loan of money. This treasurer and counsel agrees to furnish the bank's money at legal interest on the borrower paying all legal expenses (examining and searching the title to the land offered as security, drawing the bond and mortgage and recording the same), and also paying him, the treasurer and counsel, a bonus (called a commission) of 5 per cent on the amount loaned. The bank itself gets none of this bonus; but its treasurer and counsel, its agent for loaning its funds, gets all of it. The bank knows nothing about it. If the bank shares in the commission the loan would clearly be tainted with usury, which if pleaded all the money lent would be lost. But how is it where its treasurer and attorney, its agent, demands and receives such commissions? I hear that the courts have recently decided such a case, but don't hear when or where.

A. We have seen no report of such a decision as that indicated by our correspondent, and so far as we know the question raised has never been directly decided. In the case of an agent, it has been held in this State and elsewhere that usury taken without the knowledge of the principal does not affect the security. (*Condit v. Baldwin*, 21 N. Y., 219.) On the other hand, with respect to corporate officers, it is said that "if the officer or agent of a corporation is clothed with a certain power, either by charter, statute, or by the lawful act of the corporation, and if he uses that power for an unauthorized or even prohibited purpose, or fraudulently, yet the corporation will be answerable for his action to any innocent third person affected thereby." (*Morse on Banking*, 106.) In the case specified, something would probably depend upon the extent to which the business in hand was left to the treasurer and counsel, and this may have been so complete as to make it easy for a court to decide, in accordance with our citation, that his act was that of the bank, notwithstanding that he alone received the profit of the usurious exaction. We have no doubt that the so-called commission would be held to constitute usury, in harmony with existing adjudications.

36. Cr.—In April, 1879, we hired a man to work on our farm for a year, we to furnish him rent and fuel and a certain sum in money per month besides. There was no written agreement. A few days

ago he said he had found another job and was going to leave, which he did two days afterward. He does not deny that he was hired for a year, nor had he found any fault with his position.

1. Is he liable for the loss and inconvenience arising from his leaving without notice?

2. Is he liable for the rent of a house, which may be unoccupied the remainder of the year?

3. While he was with us he lost some 20 days, visiting and otherwise. Can he be charged with fuel and rent during this time, as his family occupied the house all the time?

4. Is he entitled to his wages for the last month? He worked only three weeks of it.

5. If the conditions had been reversed, and we had turned him off without notice, how far should we have been liable?

6. If there had been a written agreement would it occasion different answers to the above questions?

A. Where a servant improperly leaves his employment during the currency of the week, month, quarter or year by which he is paid, he is not entitled to wages for any part of that week, month, quarter, or even year, though there has been a strong judicial protest in New Hampshire against the hardship of this rule when applied to a yearly hiring and payment, and the Connecticut courts may ultimately decide to follow the exception rather than the rule. They have already decided that if one is wrongfully discharged during the term, he may treat the contract as rescinded, and sue for the labor actually rendered. (*Ryan v. Dayton*, 25 Conn., 194.) This decision furnishes an answer to query No. 5. As the law now stands, the answer to query No. 4 is that no part of the last month's wages are due. In accordance with the reason of the rule first above stated, our correspondent's third question should be answered in the affirmative; but we know of no direct adjudication on the point. As to Nos. 1 and 2, it may be said that the delinquent employee can be charged with direct actual damages arising out of his breach of contract, but we are inclined to think it doubtful if he could be made responsible for the house rent beyond the period of his occupancy. These answers would not be different if the contract had been in writing.

37. Cr.—“Can a man collect wages for services rendered on Sunday.”

A. The Sunday laws are variously interpreted in the different

States. In Connecticut only "works of necessity and mercy" can be legally performed "on the Lord's day." If the wages were fairly earned by the performance of any such works as are within the exception, they can be legally collected.

REAL PROPERTY.

1. Can a foreigner hold and transfer real estate in this State, he never having declared his intentions of becoming a citizen?

A. An unnaturalized alien cannot hold and is not authorized to convey real estate in New York without making a declaration of his intention to become a citizen. But a law was passed in 1877 declaring that the title of any citizen to real estate shall not be questioned by reason of any alienage of former owners, so that a title from an alien would seem to be good if given to a citizen.

2. Some 70 years ago a native of New York settled in one of the British West India Islands, married and had issue there a son and daughter, who settled in England, married there and have children.

Query: Can these children born in England inherit or take by devise real estate in this State? Further, does the last treaty between the United States and Great Britain, negotiated by Mr. Reverdy Johnson, alter the statutes of claims relative to bequests or inheritance of real estate, and supersede State law?

A. The statutes of New York provide that aliens may inherit real estate and take such property by devise. The son and daughter first in descent above noticed would be citizens of the United States, and if they were ever in that country their children would also have the same right.

3. A B has sold to Y Z a plot of ground on which to build two houses, to be paid for, with interest and taxes within one year from date of sale, or as soon as the houses are completely finished. Now supposing that after the houses are partly built Y Z fails, and a mechanic's lien is established for the benefit of the dealers who supplied the building materials, will the lien attach to the land as well as to the buildings, the fee being still in A B, who by his contract is only to give a deed on actual payment of the purchase money? And if so, how can he protect himself?

A. By the New York county lien law (chap. 379, Laws of 1875) it is expressly provided that the land on which a building

may be erected, shall be subject to the lien only to the extent of the interest which the person who caused the building to be constructed has therein, if he has less than fee simple estate. In this case his interest in the land would be nothing whatever, after forfeiture of his right to have it conveyed to him.

4. I purchased 100 acres of land in Illinois, and my wife's brother, then being in Chicago, informed me that he could sell it for a good price if I would deed it to him. I did so, naming the consideration \$1,000. He, after a few months, informed me that he could not sell it, and would deed it back to me, but did not do it; but deeded it to my wife (who is his sister) and my three children, without any consideration only nominally \$1,000. I did not know of this until last summer; a gentleman wished to buy it, and discovered that the title was not in me. Have I lost the ownership of that land? I have never received a cent for it. Is the conveyance legal without some consideration? I wish to get it back to give my youngest daughter, who was then unborn, an equal interest in it.

A. An application to a court of competent jurisdiction, with proof of the facts, will, undoubtedly, result in an order cancelling the deed to the wife and children, and compelling the trustee to reconvey to the husband and father according to the conditions of the trust.

5. Does the land carry the buildings on it? I buy a piece of ground for which I hold the deed, and afterward some buildings are erected on it, do land and houses belong to me in the eye of the law, by virtue of my possession of the deed for the former, provided there is no writing in existence showing who is the actual owner of the latter?

A. The land carries the buildings on it, unless some other person by lease, lien, or other right can claim an interest.

6. A, who is possessed of real estate, marries B, who is not possessed of any; B dies, leaving children by A. Does her dower right in A's property descend to her children, or does it revert to A? If to the former, can A dispose of it? The real estate is situated in New Jersey and Pennsylvania.

A. The "dower right" alluded to, is the right of a widow in the real estate of her deceased husband; as he is living at her death, there is nothing to descend from her to the children.

7. In 1867 I purchased real estate in this city (N. Y.); in 1869 the grantor died. Now his widow, not having joined in (and perhaps without previous knowledge of) the conveyance, claims dower. The

consideration was \$3,000, less a mortgage of \$1,500, then and now on the property, and the gross income therefrom has only amounted to enough to pay the interest on the mortgage. Please say how much she should receive.

A. The widow's dower is one-third the value of the property in 1867, at the time of its sale, less the incumbrance, if it existed before the marriage or she joined in it. If the annual rents and profits have been only enough to keep down the interest on the mortgage, as stated, the above is all she can receive; if more, she could recover one-third of this net amount for a period of six years prior to her making claim.

8. Some years ago my father, now deceased, erected a house with a party wall, said to be on the centre of the line dividing his lot from the adjoining vacant lot. The vacant lot has passed through several hands, and the present owner is building on this lot and using the party wall. Can we collect from the party for use of wall?

A. When one owner set his house so as to cover a portion of the land of an adjacent owner, who thereupon erected a house adjoining this, and inlaid its beams into this wall to the line which divided the two estates, it was held not to constitute it so far a party wall that the first could call upon the other to pay for any part of it. Having placed it upon the second man's land, it gave him a right to use so much of it as stood upon his land, unless this was done by some agreement between them.—*Orman v. Day*, 5 Flor., 385; *Sherred v. Cisco*, 4 Sandf., 480. And where by agreement between two adjacent owners of lots that one might erect a wall for building partly on his lot, and partly on the adjacent lot, and the other was to pay for half the wall when he, his heirs, or assigns, should build on his lot and use it as a party wall, it was held to be a personal covenant, and did not bind the assigns of the one, or give the assigns of the other the right to recover for the half of the wall when occupied by the erection of a building.—*Cole v. Hughes*, 54 N. Y., 444.

9. A party sold a house in the city. In making sale nothing was said about chandeliers; has the seller the option of taking or leaving them?

A. Gas fixtures are not part of the house, but go with the furniture, and may be removed unless there is something ex-

pressed or implied in the sale, by which they can be claimed as included in it. A man who should sell a house empty of everything but the chandeliers, might fairly be held to have sold it as it stood, these to go with the house.

10. A buys a parcel of real estate of B and receives a warrantee deed of B: B is a trustee for a railroad company and holds the land in trust. B neglects or refuses to have his deed recorded. A loses a sale thereby; what is A's redress? What is the first step? Three years have passed since making of the deed. B promised to attend to it immediately.

A. If A has the deed in his possession, as he should have, he can have it recorded himself. We infer, however, that he has not, and such being the case, he will find it necessary to go to a lawyer, who may bring an action to compel B to perfect the title, or sue for damages for breach of covenant for titles, as A may prefer.

11. L bought real estate of B and wife, the property being in the name of the wife. L received warranty deed signed by B and wife, with names of two witnesses, one being the notary who attached the usual certificate. Afterward B and wife claimed that one witness signed the deed before the wife, and not in her presence, and that in consequence the title did not pass. L of course knew nothing of this fact, but received the deed as correct. Now the Judge decides "no title passed," although he was himself the attorney of L and delivered the deed as being correct. What redress has L?

A. There must be something more in the case than is set forth in the statement. If B and wife actually executed the deed, and delivered it, the irregularity quoted would hardly vitiate the title. If the case is fairly presented above, and there is really a cloud on the title, we do not see why B and wife may not be compelled to remove it and to perfect the conveyance.

12. I am a large owner of land in the Adirondack country, and as there is a great noise of silver and gold discoveries in that section and hundreds of claims entered, etc., I should much like to know what the laws of our State, (N. Y.,) are regarding such entries, and what title they can make on my property which I have owned for more than 20 years, and taxes paid, if such discoveries should be made?

A. All mines of gold and silver, and with certain qualifications other mines also, though discovered upon private property in this State, (N. Y.,) belong to the State and not to the land-

owner. The discoverer of any gold or silver mine, however, has the privilege of working it for 21 years and taking the entire product. If the landowner refuses his consent to enter upon and break up his land for the purpose of mining the ore, commissioners will be appointed by the Supreme Court to assess damages for such use of the land.

13. I am the owner of a three story house 42 feet deep, which was connected by a party wall of eight inches with a house of the same depth. About three years ago my neighbor tore down his house, and put up a five-story house 60 feet deep. A short time ago I had my lot surveyed, and find that my neighbor has encroached on my lot to the extent of $1\frac{1}{2}$ inches in front and $5\frac{1}{2}$ inches in the rear of my lot, on which he built the extension of 18 feet. Can I compel my neighbor to remove his wall?

A. The facts stated are not sufficient to decide the question. The line built upon may have been established by prescription, through the existence of a line fence for 20 years, so that it is now too late to correct the error; and this prescription may have taken place either during the present ownership or prior to it. On the other hand, if our correspondent knew that his neighbor was building over the line, and permitted the work to go on without objection, he is now estopped from raising the point. But if there has been no prescription, and the true line has only now been discovered, the law doth give, and the court must award it, at whatever cost to the intruding party.

14. The side wall of my house (built last year) encroaches one and a half inches on my neighbor's lot, and he will listen to no kind of arrangement. Must I remove the wall?

A. It is an admirable principle that "where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." Therefore, if a man sees another building over his line, knows that the builder is encroaching, but permits him to go on without notice of his mistake, a court of equity would do the highest justice in forbidding any subsequent rectification of the error at the expense of the innocent party. But the application of the principle has been subject to very rigid limitations. In one case in Massachusetts (*Brewer v. Boston and W. R. Co.*, 5

Met., 478), the parties verbally agreed on a line, not the true one, and the plaintiffs stated to a purchaser from the defendant that he (plaintiff) did not claim beyond it. Nevertheless, the true line having been subsequently discovered, the Court held the plaintiff entitled to recover it, though it embraced the defendant's improvements. Bigelow says—"The principle upon which these cases proceed is that there must have been, when the incorrect line was acted upon, a *knowledge* of the true boundary by the one party, and an ignorance of it by the other, in order to estop the party from asserting it within the period of limitation ; and this, though it may have been the intention that the incorrect line should be fixed as the true one, and acted upon accordingly." In a New York case, decided by the Court of Errors (Adams v. Rockwell, 16 Wend., 285), there was a *dictum* by Chancellor Walworth to this effect—"The party whose right is to be thus barred must have silently looked on, and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line which would be an injury to him, and which he would not have done if the line had not been so located ; in which case *perhaps a grant might be presumed* within the twenty years." In an earlier New York case (Wendall v. Van Renssaler, 1 John Ch., 344), Chancellor Kent said with much greater positiveness—"There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion or title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person." All the cases which we have examined, however, demand that the party encroached upon should know of the encroachment, and this in fact is no more than just. A man ought not to lose his land by his neighbor's error, where he has not been in fault himself. In the above case, it is probable that neither party was aware of the encroachment, while the wall was going up. In that case, we think the party encroached on can compel its removal.

15. A purchases a valuable house of B on leased grounds, November 1, title to pass and balance of purchase money to be paid February 1. Nothing was said in the agreement about insurance. Of course B holds the policies. Now we will suppose the building burns down in January, what is A's position in regard to the insurance? And ought not A to have insurance effected on his account? And in that case how much of the insurance would be payable, and to whom?

A. A's claim could only be upon B for fulfillment of contract, inasmuch as the insurers of the latter not having notice, prior to the fire, of A's inchoate interest in the property, would not recognize that interest.

B having allowed A an interest in the property, would not find it difficult to prove an "entire, unconditional, and sole ownership," as provided for in the insurance contract, and hence, could not have trouble in collecting his loss from the companies.

Due notice to B's companies when sale of the property was begun, with a recognition of A's interest by indorsement on the policies, would avoid any difficulty after the fire, and enable each party to obtain indemnity according to their respective interests.

16. Can a man buy a house in a respectable neighborhood, and transform it into a wholesale and retail liquor store, without the consent of his neighbors? If he does establish himself without consulting them, can they not draw up a petition stating that his place is a nuisance, lay it before the proper authorities, and have it closed?

A. If a liquor store becomes a nuisance, and the fact can be legally established, it can be suppressed. But the mere fact that a dwelling house has been altered into a liquor store, is not a sufficient cause of action.

17. A leaves B, his son, a house and lot during his natural life, with remainder to his children (four now living) provided that B pays into the estate \$100 for equalization of shares, etc. B pays the \$100, takes possession of the premises, and has enjoyed the rents, etc., etc., ever since. B has the house insured (in his own name), and claims that if the house is burnt down the insurance money must be paid to him absolutely, and that his children have no claim upon it whatsoever, thus virtually leaving them with nothing but an interest in the bare lot. If wrong, what disposition should be made of the fund, and how, by whom, and by what authority?

A. B having paid the insurance premium out of his own means, the insurance money in case of loss must, we suppose,

if the law is strictly constructed, be paid to him, and belongs to him. But there is another question involved, viz : whether or no B is not liable to rebuild the house. If there is nothing in the will to settle this question, it cannot be answered in as positive language as we should like to use, considering the clear equities of the case. An English law writer, describing the liabilities of the tenant for life under such circumstances, remarks that "the law on this point is not in a satisfactory state." (Gibbons on Dilapidations, 133.) Chancellor Kent goes so far as to lay down the rule that if the building is destroyed by fire through the *negligence* of the life tenant he is answerable, and must rebuild. (4 Kent's Com., 82.) But this statement was founded on the same authorities discussed by Gibbons ; and Kent goes on to say that "there does not appear to have been any question raised and judicially decided in this country respecting the tenant's responsibility for accidental fires as coming under the head of this species of (permissive) waste." So far as we have been able to ascertain, this observation is as true now as when Kent wrote. The question, therefore, seems to be an open one ; but the equities so strongly demand a remedy in favor of the children, that if the courts should find themselves obliged to declare against B's liability to rebuild, we are disposed to think they would strain a point to hold that the insurance money should stand in place of the destroyed building. The will, however, may render all speculation unnecessary, and that should be studied for the conditions, if any besides that above mentioned imposed on the life tenant. A condition that he should surrender the premises without diminution or dilapidation except ordinary wear and tear would probably be construed so as to make him liable to rebuild in case of fire, and perhaps a requirement that he should keep the building in repair would carry the same liability.

18. Two men own two adjoining properties. One of them raises his ground say $1\frac{1}{2}$ feet, but in so doing all the natural water, rain or snow that falls upon his ground so raised up, goes down on his neighbor's property, damages it, and even goes in the basement of his house. I wish to know whether the injured man can recover damages, or at least compel his neighbor to build a wall sufficient to keep the water from the low ground ?

A. No man can change the natural grade of his land so as to drain it upon his neighbor's estate, and thereby damage it. He is liable for all accruing damages until he takes steps to prevent the result.

19. A buys one of two frame houses in Brooklyn, which were built together, the studding between the two forming the party wall. A wishes to pull down his house in order to rebuild of brick. Adjoining owner refuses to permit the removal of the studding on his side of the line. It being impracticable to split the studding, how can A obtain his line?

A. The decision in the Court of Appeals in a case where the party was created under the same circumstances as in the above instance, was that each party had an easement in the whole wall, at least as long as it continued sufficient to support the existing buildings. Only in case one of the buildings became so dilapidated as to be unsafe and unfit for occupation, and the removal of the front and rear beams would occasion the destruction of the whole wall, could one owner, on reasonable notice to the other, take down the whole wall. (*Partridge v. Gilbert*, 15 N. Y., 601.)

20. A buys of B a piece of real estate in Virginia, for which he agrees to pay a certain amount in cash and residue in deferred payments. He makes the cash payment, but before the maturity of the deferred payments becomes financially embarrassed and is unable to meet the payments at maturity. Can B sell and give a legal title to the property without the consent of A? or, will he not be required first to institute legal proceedings for the unpaid balance, as there was no forfeit expressed or implied in the agreement of sale?

A. The question of title depends on the record. If the agreement to sell with its conditions has been recorded, B cannot give a subsequent conveyance to another party with a clear title without further proceeding against A to settle the original contract. He can sell the land, however, transferring to the new purchaser exactly his own interest and substituting him in his stead, leaving him to wait on a settlement with A, the first contractor.

21. A responsible party sold me a house in course of construction; there was water in the cellar at the time, and under the representation that this was "surface" water, that it was retained there for the purpose of mixing mortar, and the seller's verbal promise that it should be drained and the cellar made dry, I bought the house. Since, it has been discovered that springs are the cause, and the seller will go to

no further expense, having tried twice to remedy the trouble. Have I not a just claim on the seller, and also a cause of action if he refuse to drain my cellar?

A. If the statement respecting the water in the cellar was a positive representation, and not a mere expression of opinion, and was a material inducement to the purchase, the buyer can at least receive damages, though the contract itself may not be set aside. "If the vendor of land knowing that the purchaser is unacquainted with it, makes a false representation as to any matters which, if true, would materially enhance its value, he is, in equity, bound to make good his representation." *Bradley v. Bosley*, 1 Barb., ch. 125. The misrepresentation might not afford ground for the rescission of the contract, (see *Story's Equity Jurisprudence*, sec. 200, p. 199, *supra* and *infra*,) but we think suit for damages could be sustained, and the buyer recover. But he must be very sure that the seller's statements regarding the water were affirmations of fact, and not a mere guess or opinion.

22. Is a boiler that was put in a building after said building was built, a part of the real estate and subject to the mortgage thereon, or is it personal property and subject to sale by the sheriff under judgment?

A. The courts have made some nice distinctions in regard to boilers and steam engines. If put in as trade fixtures by a lapse they may be regarded as personal chattels and removed by him at the expiration of his lease. If put in by the owner of the fee, to be used for the purpose to which the building is applied, a subsequent mortgage will hold them as part of the realty. But if the boiler was put in after the mortgage was given, and inserted in such a way that it can be removed without material injury to the building, it may be held subject to a judgment as the personal property of the owner.

23. A made a will, then died and left an estate of \$50,000, giving his widow the income during her life. At her death it goes to his two sons and his daughter. Before the mother's death a judgment was entered up against one of the sons. That son sold his interest in the estate to his daughter-in-law, who transferred it back to his wife. Will that transfer prejudice the judgment?

A. If the debt for which the judgment was obtained existed

at the time the son transferred his interest in the estate, the transfer is *prima facie* fraudulent, and can be set aside so as to allow the judgment creditor to levy on the property, whether in possession or expectancy.

24. A sells his clear real estate to his son-in-law, giving him a clear title ; son-in-law resells the same to A's wife, making title in her name ; A dies possessed only of personal property ; can any creditor of A bring suit and claim on the property sold to A's wife ?

A. If A was insolvent when the deed was given, and the transfers were made to evade the pursuit of his property by his creditors, no consideration being given by his purchases, the courts would probably set aside the conveyance in behalf of persons whom he owed at the time of the transfer. But if A was solvent when the transfer was made, and it was done in good faith to settle the property on his wife, the conveyance will stand, and the property will not be subject to his debts.

25. ILLS.—I have in view the purchase of half interest in property in Illinois, but upon writing to the County Clerk find that the property now is and has been in possession of squatters since 1837. Will you kindly inform me in regard to squatters' rights in this State, and in case my title was good, what I would be obliged to do to dispossess the above parties, and probable cost ?

A. It would be necessary to bring an action of ejectment to dispossess the "squatters," if they refused otherwise to vacate the premises, but the probable cost cannot be foretold. The intending purchaser should moreover be sure that the so-called squatters do not occupy the land under something that purports to be a deed or grant, constituting what is called by the Illinois statute a paper title—since if so, it is quite likely that, however worthless it may have been at the beginning, it is now placed beyond dispute by the statute of limitations.

26. MISS.—In 1860 I bought one of a row of two-story brick stores 72 feet long by 24 feet 7 inches wide, meaning from the centre of one wall to the centre of the other, the walls on both sides being party walls. On March 19, 1879, a fire originated in the second store north of mine, which totally destroyed mine and damaged the upper portion of the one next south. The upper stories of these buildings have only 9 inch walls, which was the cause of the fire spreading—the joints of the different stories meeting each other.

The wall on the south side of my building is of course a party wall ; my neighbor's side was not as much damaged as mine ; the entire wall was condemned by two competent builders under oath, the insurance companies paid it ; my neighbor commenced to rebuild on this burned and condemned 9-inch wall without my consent ; I enjoined him, had eight of the best builders and contractors whose characters cannot be questioned, who swore the wall was unsafe ; my neighbor brought up a number of men who were partly interested in the repairing of the building who swore the wall was safe. Our judge dissolved the injunction. My neighbor's store is used as a bar-room : I use my building as a hardware store, and consequently require a good wall, I am unable to lay my joist on the wall, as my neighbor's joists nearly reached through. What must I do ? Must I abandon the ground on which stands a wall I cannot use, or are there laws in the country by which I can recover my rights ? Is not a judge bound in his decision to take into consideration the fact that the wall was lawfully condemned by the insurance companies and paid for by them ? Is not the judge bound by his oath of office to take into consideration the characters of the witnesses ; especially as all of them are personally known to him ?

A. The law relating to party walls is not to be found in any single book, but is scattered through the legal text books, reports and State statutes. The Mississippi statute law governs only a few points, and is laid down in sections 1,916 to 1,920 inclusive, of the revised code.

The vice-chancellor was calmly bound to take into consideration all the evidence, and to weigh the character and credibility of the witnesses, but if he failed to do so there is no remedy, save an appeal. The demand of an injunction however does not end our correspondent's case. If he cannot make use of the rebuilt party wall as before, whatever damages he may sustain are recoverable in an action at law, triable by a jury upon all the evidence.

27. N. J.—Can an alien hold and convey real estate in New Jersey ?

A. An alien can hold and convey real estate in New Jersey.

28. N. J.—In the State of New Jersey A sells to his son B a parcel of land and executes a warranty deed therefor. At the same time there is a mining title, well known, covering the property. B sells to C and executes a warranty deed also. A is dead ; B is insolvent ; can C look to the estate of A, which is good, for redress ? And also is a mining title which has not been worked for 22 years invalidated

in consequence? C desires to sell the property, but cannot on account of this existing mining title.

A. If the deed contains a covenant that the guarantee shall quietly enjoy, and that the grantor will warrant and defend the title, the right of action against the original warrantor runs with the land into the hands of whoever becomes the grantee. (*Carter v. Executors of Denman*, 3 *Zabriskie*, 260.) C can therefore look to A to make good the covenant, provided he is disturbed in his possession, or there is an attempt made to assert the title. Its mere existence, however, is not sufficient to enable him to maintain an action against A. Attention must be paid to the precise form of the covenant of warranty, as above stated, since a covenant against incumbrances merely would not vest any right of action in C as against A. If the holder of the mining title, being of age and sane, has not been in possession within 20 years, he cannot now assert it, but if an intending buyer cannot otherwise be satisfied on this point, it may be necessary for C to bring a bill in chancery to quiet the title. It would indeed be the part of prudence in a purchaser to require this, as we cannot, without the evidence in detail before us, undertake to say whether or no the land has been held adversely to the mining title long enough to defeat it by prescription.

29. P.A.—Is the perpetual lease of an oil well in Pennsylvania, with royalty, real estate or personal property?

A. Supposing the lease in question to be in the common form, for a certain term, with covenants to renew, it would in our opinion constitute nothing more than an estate for years, which by New York law is denominated a “chattel real,” and goes to the administrator. If the Pennsylvania law on the subject however is sought, it may be considered a question which, so far as we can ascertain, is undecided, whether the estate would not be treated as realty, the Pennsylvania courts having decided that such is the nature of the ground rent.

30. S.C.—Would right of dower attach to property of an insolvent against whom judgment were on record prior to his marriage, and property sold under execution?

A. Prior to 1873 judgments were not, before levy, a lien on

real estate in South Carolina, and if the marriage took place before these concurrent events, the right of dower would attach. Since 1873 judgments constitute a lien, and if the marriage took place since, the right of dower does not attach until after the judgment lien has been discharged.

RECEIPTS.

1. Does the law compel a person to give a written receipt for money received in payment of a bill?

A. In this State, unless as satisfaction of mortgage upon real estate, no receipt has been demanded. It is not a good legal tender to offer payment on condition of a receipt. If the payee is so piggish that he refuses to accept, the debtor must furnish his own evidence of payment by attesting witnesses. The creditor need do nothing but pocket the money.

2. Would a receipt admitted to be genuine calling for the full payment of an account, be accepted in a court of law as sufficient evidence of payment, or would it be necessary to produce the check with which payment was made?

A. No such document is "sufficient evidence" of payment to stand against positive testimony that no payment has been made. The United States Government exacts duplicate and sometimes triplicate receipts to be formally executed and transmitted with the vouchers, before any order for payment is issued. Our advertising and subscription bills against Government officials are receipted in this way a considerable period before the check for payment is issued. A written receipt is not therefore full evidence of payment.

3. Is a receipt for money written and signed in pencil legal and valid, and can it be put in evidence in a court of law? Or must the receipt be written and signed in ink?

A. A receipt written and signed with a pencil, if its authorship and integrity can be established, is just as authoritative in evidence as if done in ink. The only difference is that if the writing is disputed, or there is a claim that it has been altered, there is more difficulty in the nature of the case in establishing the genuineness and originality.

RECEIVERS.

1. A man in business without partners becomes insane ; how can the business be settled up or carried on ?

A. Insanity of a partner established beyond question dissolves the partnership. Story on Part., 295 ; *Isler vs. Baker*, 6 Hump., 85. If he has no partners the courts will appoint a receiver or committee to manage the estate.

2. Judgment was obtained against me for \$2,000 ; subsequently my property, consisting of a house and lot, where I reside, was placed in the hands of a receiver ; the plaintiff's attorney notified me by a pencil memoranda on the back of the notice of the appointment of the receiver, that the rents of my tenants would be collected and also that I would be compelled to pay rent, and stated the amount. Now can the receiver or any one else collect rent from myself when I am owner of the property ? In the absence of my attorney in Europe I have consulted three lawyers and the receiver (also a lawyer) on this point and all four seem to be befogged ; the latter party is of the opinion that I must pay ; the three others that I am not compelled to pay rent.

A. The property being in the hands of a receiver, he has the right to collect for its use, no matter who occupies it. We proceed, of course, on the supposition that the owner had not taken any steps previous to the judgment to secure a legal homestead right in his residence.

SELLER AND PURCHASER.

ASSIGNMENT.

1. A of New York makes a sale to a party residing in England, and ships the goods, but the money does not come as soon as anticipated, and A is compelled to sell his claim. He makes an assignment of it, signs and affixes his seal in presence of some one who witnesses the signature. Is that sufficient, or must it be acknowledged before a notary ? The party buying the claim is a friend of A's and takes his representation that it is good. He also says, " You need not notify the party in England of the sale, but receive the draft as though nothing had been done, and when you get it indorse it over to me." Is that safe in case another party should have a claim against A and want to attach the claim on the other side ? Could the third party attach a claim there ? And is it necessary the party owing the sum should be notified of the sale of the claim ?

A. Neither acknowledgment before a notary, nor a seal, is necessary to make a valid assignment in such a case. But the

proceeds of the sale might be attached in England by a debtor of A, and without notice to the party the assignee may find himself involved in trouble and cost.

2. A sells a bill of goods and hands the order to us. We fill the order from our stock in A's name, A rendering his own bill to the party to whom he sold the goods. On the same day on which the goods go out of our store, A assigns the amount of the bill to us. When the bill becomes due the party remits to A (as the party is ignorant of the assignment), and A afterwards pays us. The question now is : Is it a criminal offense if A retains the amount of the bill (previously assigned to us) and refuses to hand it over to us ?

A. A's act is not criminal in the popular sense, but it is a conversion in the legal sense, and in a civil action, upon recovery of judgment, we think his person would be liable to be taken on execution, that is, he could be imprisoned.

3. I buy a lot of goods of a dealer, and he fails in business, and I wish to remit a check for the said goods, could any legal trouble result in sending a check to his order ?

A. If the bankrupt is settling his estate under the old bankrupt act, or had made an assignment, or has otherwise empowered any one else to collect his assets, and our correspondent has had notice of his condition, he may run the risk of having to pay the debt twice.

4. A customer of mine bought 100 barrels of flour, paying for half, I delivering half, leaving the balance to be delivered afterward at his option, paying on account generally as he buys. In a week or two he fails. Can he by law make me his creditor for the balance, or can I retain it to secure my debt ?

A. The seller can retain the flour, unless the buyer tenders the money and demand delivery.

CONTRACTS, DELIVERY.

5. A buys a lot of goods with the understanding if any are sold less, price is made less to him ; and later the remainder of the lot is sold to him at a less price. Is he entitled to prior purchase at the same price as last sale ?

A. If the contract is precise and is so drawn that a sale of any portion of a stock of similar goods to any one at a less price is to operate to reduce the original price to correspond ; and the

first purchaser takes the remainder at a lower rate without any waiver of this condition, he is entitled to his reduction. But it might be sharp practice to claim it, since the ordinary understanding under these circumstances would be that the sale to the first purchaser of the remainder of the lot exempted it from the condition mentioned.

6. A of Savannah buys of B of New York 5,000 sacks of salt upon the following conditions : \$1 per sack, delivered in Savannah, cost, freight, and insurance. In case of loss or damage by sea, who is bound for the loss to A, the party B from whom he purchased, or the insurance company in which B is insured ?

A. A has purchased the salt deliverable in Savannah, "cost, freight, and insurance," and has no interest in the property until delivered. If tendered in a damaged condition, he may reject it, or receive it and make reclamation on B, the seller. If B has it properly insured he can make his claim and recover of the underwriter ; but he would be liable to A, even if he could not recover his insurance.

7. We are agents for an Apple Evaporator on the line of the New York Central Railroad. A broker wanted to purchase for a Boston merchant 50 boxes. He bought five and ordered them shipped with the privilege of 50. The merchant on receipt of the five telegraphed us to "ship but 45 by Stonington line to-night." As the broker knew our stock was all stored at evaporator, we keeping only samples in the city, did not notify either party, could not ship by Stonington that night, but telegraphed to Evaporator to ship direct to Boston via Albany. They were ordered on the 2d and shipped on the 3d. Five days after shipment received telegraphic dispatch "order countermanded, do not ship apples." Apples had arrived in Boston previous to dispatch being received countermanding order. Consignee refuses to accept apples and holds subject to our order. It was a bona fide sale and delivery ; are we to blame for the manner of delivery, or only the difference in freight if any ? They were not shipped via Stonington line nor that night, but by as good a line and as soon as possible after order received.

A. The order to ship by "Stonington line to-night" appears to us to be absolute as to the time and method of shipment and a condition to be complied with to render the order valid. The seller should have notified the buyer by telegraph that the goods would be ordered directly from Albany, leaving him the option to countermand at once if that would not meet his requirement.

If he had done that and no reply had been received he could have collected his bill. As it is, although equity would seem to be on the side of the seller who has acted fairly throughout, the courts will doubtless hold that there was no legal contract, and the buyer is not obliged to take the goods.

8. I sold to a party some goods to be delivered, 20 casks a month for five months, payable at 30 days from delivery at a certain price. The first delivery is made; the party finds fault—finds the cask not large enough, and raises question about the quality of the goods. Am I obliged to deliver all the future goods at 30 days, or can I offer to deliver the goods providing I am paid c. o. d., with deduction of the interest for 30 days? If the party does not pay my first bill, or raises objection and wants to pay only something on account, does that not vitiate the contract? Can I not then oblige him to pay me on delivery, or give me a bond to guarantee me to be paid at 30 days?

A. The seller cannot depart from his contract before an actual previous breach by the buyer. It is not a breach of contract to complain about the character of the merchandise delivered, or even to refuse payment in full, if it can be established that the goods are deficient in quantity or different in quality from those described in the contract. But if our correspondent is sure that he has himself fully conformed to its terms, and the buyer makes default in payment of the first bill when due, the former may then exact what new terms he pleases, or throw up the bargain altogether, and refuse to deliver any more goods.

9. I received an offer by wire from Boston of a car of flour from the agent of a Milwaukee mill October 17th. I wired an acceptance of the offer to Boston at once. The flour was not shipped from Milwaukee till October 27th, and then flour had declined 50 cents per barrel. I claim it is optional with me to take the flour or not on account of the delay in filling the order. The miller claims I am bound to take the flour and pay the price agreed. Which is right?

A. If the offer implied that the flour was in Boston, and ready for immediate delivery, the fact that it had not left Milwaukee, and was not shipped thence until ten days thereafter, proves an unreasonable delay, and we think that the buyer might properly refuse to accept it. But if there was no such implication and no time as to the date of shipment, the contract would still be binding notwithstanding the delay.

10. A New York merchant ordered some goods from the agent of a Boston house about three months ago, it being understood that they be delivered as soon as possible. Five or six weeks after, the goods not having arrived, he told the agent to cancel the order, explaining that he did not need them then, and that he could get the same kind of goods cheaper. The agent went away apparently intending to cancel the order. A week ago the New York merchant received a notice from the steamboat company that the goods were on the pier awaiting removal by him. He did not send for them. Two days later he met the agent and told him of the arrival of the goods; the latter pretended not to remember being told to cancel the order, and tried to induce the merchant to take the goods, saying he need not pay for them until they were all sold; this the merchant refused to do. Can the New York merchant be held responsible, or, should the Boston house recall the goods? The merchant has received another notice to-day, saying that the goods are still on the pier, and requesting their removal.

A. If the above statement includes the whole case and can be verified, we do not think the buyer can be held to take the goods. We assume that the delay in the delivery of the goods was such a violation of the contract to deliver "as soon as possible" as to support a revocation of the order, without the agent's assent.

11. On the 1st inst. I bought a bill of goods, the seller agreeing to deliver them on the same date. The goods arrived on the 3d, and I lost the sale of said goods by their not being delivered as agreed? Am I justified in returning the goods?

A. If it was part of the contract that the goods were to be delivered on the day of purchase, the buyer could have refused to receive them when tendered at a later date; or have notified the seller at once to take them away. But if he has been several days making up his mind about it, we are afraid that it is now too late to reject them.

12. We shipped by order of a house in San Francisco five cases of merchandise on July 17, 1877, and sent them bill and bill of lading; they made no objection as to price, etc., except terms, which they claimed at that time should have been 60 days; we drew upon them, which was not paid, they claiming that the goods were destroyed in Pittsburg. Have we good claim against the parties who bought the goods?

A. If the order was given to have the goods shipped with the understanding, as usual in such cases, that they were at the risk

of the buyer while on the way, the seller can recover although the property may be lost.

13. A, in North Carolina, orders a bill of goods from B, in New York, and does not direct by what line goods to be shipped.

B ships goods, but sends no bill of lading to A. The goods are never received by A. Can B recover the price from A or must he look to the carrier?

A. B can recover of A, on proof that, as customary, he shipped the property by a responsible carrier. A can then recover of the carrier. It requires no bill of lading to hold a common carrier responsible. Proof that the property was received by him is sufficient to establish his liability.

14. I consign a case of samples to party in interior of Texas, marked simply with consignee's name and address, or inclosed form of bill of lading, which is headed a through bill of lading. The case is lost. The steamer line shows railroad receipt. Am I to look to steamer line or railroad?

A. The owner can hold the contractors here for the value of the package, leaving them to collect it of the railroad.

15. A bought in October one bag St. Jago coffee at 26 cents per pound, 60 days, and it was so invoiced to him; but on receiving it he finds that Rio coffee was sent instead, and consequently he leaves it subject to the seller's order. In February A agreed to keep the Rio coffee at an allowance of two cents per pound. When should the bill become due, from the date of the first purchase, or from the date he agreed to keep the goods at the reduced price?

A. The date of settlement depends on the new agreement. We should infer that the terms were an allowance of two cents a pound for an immediate cash payment, but this is the very question to be settled. Not being present at the conference we cannot decide.

16. A has to arrive 1,000 bags of merchandise by a certain vessel, which he offers to B, who buys 400 bags of it. C afterward buys 400 bags, and D takes balance 200 bags. No contract passes between buyer and seller, but price paid is full market value for sound goods at that time, and seller assures buyer that the merchandise is of best quality. The vessel arrives and the cargo is partly damaged. Is B entitled to 400 bags sound out of the 1000 (he being the first purchaser) or must he take it as it comes out, say 400 bags first landed, and accept that for his purchase. And if so, is he entitled to any claim on seller for difference in value between sound and damaged, on any

damaged he may find among the 400 bags delivered him? Or, market having advanced considerably so that the seller offers to take back from B any damaged bags, would A be required to make good the rejected bags out of the cargo?

A. If the sale was made by a certain lot "to arrive," and was not a positive contract to deliver, without regard to such arrival, a certain amount of merchandise of a given quality, then all the buyer can claim is the option of accepting or rejecting the goods on arrival. This would be simple enough if there were but one buyer. In regard to the division of the offer between the different buyers, neither can claim any precedence on account of privity of contract, inasmuch as the whole lot sold was to arrive at the same time. If the seller divided the entire lot with equal proportions of sound and damaged and tendered each buyer his share, all they can do, in our judgment, is to accept or reject the offer thus made. They cannot take part and reject part, nor can either of them claim damages for the failure, provided the sale was made to arrive, as we infer from the statement. It is optional with either party to abide by the contract, as being verbal, it cannot be legally enforced.

17. Jones sells a lot of say 5,000 barrels apples to Smith, the latter to take them at the rate of 1,000 barrels per week. The lot is in storage at Jones's place of business, when a fire destroys the remainder, say 3,000 barrels. The question is, who is the owner of the goods in store, the seller or the buyer, the latter having purchased them but the former holding in store to accommodate him (Smith)? It may be put thus: does the delivery of a part constitute the delivery of the whole?

A. The goods in this case are held by the seller for account of the buyer, and at the latter's risk; and if the former takes ordinary and reasonable care of them, the loss, if any, will fall upon the latter.

18. A sold 50 packages of merchandise to arrive, and delivered 40 on the contract. A makes a demand for payment for part delivered. B refuses to pay the same on the plea of non-fulfilment of contract.

If A refuses to deliver the entire lot sold, has he a legal claim for the portion delivered? B refuses payment for the part received on the pretext noted. Are you aware of any decisions in similar case? If so, can you cite them?

A. If the merchandise was sold "to arrive" by any particu-

lar vessel, and the requisite quantity did not arrive, the contract was at an end. (Parsons on Contracts, vol. 1, p. 554.) In that event, we are disposed to think that B would be compelled to pay for the merchandise received and retained. If, however, the full quantity demanded by the contract did arrive, but was not delivered, it seems to be the harsh rule of law in the State of New York, contrary to that generally prevalent, that the seller cannot recover anything for the part actually delivered and accepted. This doctrine is supported by the following cases in the New York courts: *Champlain v. Rowley*, 13 Wend., 258; 18 id., 187; *Mead v. Degolyer*, 16 Wend., 632; *McKnight v. Dunlap*, 4 Bard, 36; *Paige v. Ott*, 5 Denio, 406; *Oakley v. Morton*, 1 Kein, 25; *Soloman v. Neidig*, 1 Daly, 200; *Catlin v. Tobias*, 26 N. Y., 217. The same ruling has been made in Ohio, but in England and Massachusetts, the buyer under the circumstances stated, would be required to pay the actual value of the merchandise delivered and retained, and Professor Parsons thinks that a similar rule would be adopted, as equity no doubt requires, by a majority of the courts in this country.

19. A & Co., commission merchants in New York, sell for customers at the South to B & Co., New York, one thousand bales cotton to arrive, basis low middling. Part of the cotton has been delivered, and owing to a sharp advance in the price of the staple A & Co's friends South are unable to furnish cotton to complete the sale to B & Co. B & Co. bill A & Co. for the difference between the market price on the day when they called upon A & Co. to complete the contract and the price at which the cotton was bought. A & Co. refuse to recognize the claim, saying that the cotton was sold to arrive, and when the sale was made by them for their customers, they supposed it was on the way or would be shipped immediately, and as the cotton did not arrive, the buyers have no claim on them. Now, have we a legal claim against A & Co. and do you think judgment could be had through the courts?

A. The buyers of cotton "to arrive" have no legal claim on the agent if the cotton does not arrive.

20. We sell for future delivery say, "about 2,000 tons" old iron for shipment from Europe during certain months by ship or ships, in various quantities, as freight-room may be engaged. After various shipments the weight of the whole lot so shipped foots up say, 1,940 tons, and the original parcel being exhausted we have no more. Can our

buyer at whatever cost to us, call on us for the extra 60 tons, or, are we covered by the legal significance of the word "about" in our contract.

A. Under the circumstances the delivery as stated will legally fulfill the contract, and the buyer will have no further claim.

21. We bought 30 bags of coffee from C, D & Co., and received from them an order on the storekeeper for its delivery. We sent this order for the coffee by our dairyman; he returns empty, with the information from the storekeeper that the coffee is not skimmed, and that there is no order to have it done. Being in need of the coffee for immediate shipment we return the order to C, D & Co., the sellers, who contend that we have no right to cancel the sale, and if we will take the coffee they have no doubt that they will be able to have it put up in merchantable order by next morning. With this assurance we send on the next morning for the coffee; the dairyman again returns empty with the information from the storekeeper that the order for skimming must come from the original owner of the coffee, from whom C, D & Co., purchased. They were informed of this fact and promised to see it rectified, and shortly afterward informed us in writing "messenger just returned from the wharf says they are now skimming the coffee." After sending three or four times a distance of about 2½ miles, our dairyman late in the evening, as they were about closing up the warehouse, succeeded in obtaining 18 bags, the balance not being ready. Being sick and tired of the entire matter we informed C, D & Co., that we would not take the remaining 12 bags. C, D & Co., contend that we must take it, that the coffee is now constructively in our possession, and that if the same burns up it is our loss. What are the rights of buyer and seller in this case? Can we be made liable for the loss of the coffee after having sent for it three or four times? or has C, D & Co. the right to compel us to take it?

A. If there was nothing in the contract of sale relative to the time when the coffee should be ready for delivery, a "reasonable time" would be allowed the seller, and what is "reasonable time," in any particular case, is for the court and jury to determine. The buyer having here virtually extended the time of delivery to the day on which the greater part was actually ready, and then having accepted a part, we incline to the opinion that his acceptance and waiver of the delay was so far complete as to bar a rescission of the sale, and leave the undelivered goods in the warehouse at the buyer's risk.

22. On 16th October we offered to sell a party in New York a number of bales of sheetings at a certain price. On 26th October we received a letter dated 22d and post-marked 24th October, accepting

our offer. In the meantime these goods have advanced in price, and so has cotton. Should not our letter have been answered in a day or two, in order to secure the goods at the price named? Are we bound to deliver, and can the party fairly claim them? It takes two days for a letter to reach New York from this Fayetteville, N. C.

A. We do not think the offer to sell made on the 16th, which reached the buyer on the 18th, was binding on the 24th, after both raw materials and goods had advanced.

23. We sell to a party who visits our store and examines the goods, 50 bales of rags at a certain price, f. o. b. The customer is well enough pleased with the goods to order two weeks later 50 bales more of the same thing, same price and terms; on receipt of which he rejects the lot, saying that they are not the same kind, and writes us to take them away. The fact is the second lot is precisely like the first, and part and parcel of the same lot. The point is whether he can reject those rags at his will 500 miles away, and compel us to pay freight and cartage both ways, or whether he should return them to us free of expense?

A. He cannot reject them at all, if the statement above made can be legally established. But as he will have a lot of workmen and clerks to swear that the second lot is not as good as the first, the issue of the suit is doubtful. If his side can be proved, he has the right to compel the seller to bring them back at his own expense.

24. In September we sold here to a firm 30 cases of goods to arrive per ship W, from Hongkong, China, and told the purchaser the ship had sailed in the latter part of May. We now find the ship left July 16. Our bill of lading is signed 20th of May, on which we based our representation. The demand for the goods sold is best here at this time of year; at the end of November the sale is not so good for this class of goods. Can we be held liable to pay damages?

A. Parsons on Contracts, vol. 1, page 559, settles this question as follows: "A statement in contract of sale of goods to arrive by a particular vessel, that the vessel sailed on or about a day named, is considered as a representation, rather than a condition or warranty as to the time of sailing; and if made without fraud, though the vessel in reality sailed at a day considerably later than the day named, and her arrival in port is thereby delayed, the purchaser is bound to accept and pay for the goods." The same question has been decided by the Court of Appeals in this State, in *Hawes v. Lawrence*, 4 Comst., 346,

affirming the contract in spite of the untrue representation as to the time of sailing, so that there is not only no damage to be claimed of the seller, but the buyer must accept and pay for the goods if they are in accordance with the contract, and are tendered to him on arrival.

25. Suppose that A has bought to arrive a list of goods, contract reading : "To deliver alongside vessel in good order and condition, and to be accepted or rejected on dock before removal." Said vessel arrives, say, May 1, and discharges part of her cargo, keeping A's goods in hold until she takes in ballast, which she does not do until say, June 1. Can A compel the ship to deliver his goods, or, can he claim damages in case of a fall in the market ?

A. The buyer has the right to demand his goods within a reasonable time after their arrival, and to claim damages if his demand is refused.

26. A drummer passes through the country, offering a few leading articles below the market value. A merchant buys them, and some other goods are sent, and the leading articles are not. Is the merchant under any moral or legal obligation to take them ?

A. Where an order is given on the condition expressed or fairly implied, that it shall be filled entirely or not at all, the buyer would not be obliged to take a part unless the whole was tendered. He should notify the seller at once of his refusal, and the better way would be to return the portion actually sent, collecting from the carrier the charges already paid. The trick described (that of offering well-known standard goods below their value, to sell others above their value) is very common, and the failure to deliver the former is a great presumption upon the forbearance of the customer.

27. When an invoice of merchandise is purchased of a firm doing business in a distant city, who is supposed to assume the marine risk when the sellers use such phrases as "we will deduct the freight," or "we will deliver them in New York ?" We were under the impression that the sellers when agreeing to deduct the freight or deliver them in New York, were virtually thereby assuming the risk of the transfer.

A. If goods are bought deliverable by the seller in New York, the latter is bound to guaranty such delivery ; but if the seller simply deducts the freight, having sold the goods deliver-

able from his own place of business, the transfer is at the risk of the buyer.

28. An indenture between a dealer and myself calls for a payment of \$240.27. After it was signed, he added articles costing \$11.50 which he said he left out by mistake. On April 7, I made payment of \$5, which made a total payment of \$245. In May I went to him and handing \$6.77 I asked him to give me bill of sale receipted in full. After looking over his books he said there was a mistake, as I owed him \$15.87 more for articles he forgot to put down, making \$22.64 due instead of \$6.77. I withdrew the \$6.77 and told him I would look into it. I moved last May without notifying him and he says he could not find my new place of residence until he had inquired once or twice at the old place, which I suppose he construes "secrection of goods with intent to defraud." He now sends me notice which I inclose and I am threatened with forcible removal of the goods. Will you be kind enough to tell me if he can hold me for more than amount stated in body of the agreement, \$240.77, or at the furthest \$251.77; and if he has a right to send to my house and remove all goods.

A. The dealer aforesaid will not dare to meddle with that furniture if he is wise. Only the \$240.27 can be included in the indenture, as the dealer cannot add any thing to it after our correspondent has executed it. If the \$22.64 really represents articles actually purchased and accidentally omitted from the schedule in the indenture the dealer is entitled to his pay for them; but he cannot seize them nor take them away, and has only a legal claim for the amount due him for them.

29. A lot of iron of a certain grade is purchased by manufacturers and used in making castings, which, owing to the inferior quality of the iron, are worthless. Its character was not discovered when the iron was melted, nor until considerable expense had been incurred in attempting to drill, dress, and plane the castings. If the iron had been of the quality ordered, no difficulty would have been experienced in the matter, but as it is, new castings of different iron from that received will have to be made. This of course entails loss, and the question is, not only the measure of it, but upon whom it should fall. The difference between the value of the iron received and the value of the iron ordered and paid for, if returned to the manufacturers, will still involve a loss to them of the time, expense, etc., incurred in making the castings, which are useless, unless these matters form a proper charge against the sellers of the iron?

A. The rule of damages in cases of this sort was thus laid down by Judge Selden, of the New York Court of Appeals, in

the leading case of *Griffen v. Colver*, 16 N. Y., 489: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." The seller of the iron, under this rule, would be clearly liable, it seems to us, not only for the difference in value between the article contracted for, and that supplied, but for the expense involved in making the castings, provided these were not of any extraordinary pattern or value, of which the seller was not notified.

30. We refer you to inclosed order sheet, according to which we promised to furnish a lot of buttons not later than May 1 to 11, but though our manufacturer had promised to deliver by that time, he was delayed. The goods arrived in July and were offered to our customer, who not only refused the same, which of course he had the right to do, but he claims damages to the amount of \$150, while the whole order only amounted to \$346.86, leaving us a small commission. We offered to have the matter settled by your decision, or by other arbiters, but were refused, he claiming that the goods were sold to a third party, which would have left a profit as above stated.

The following is a copy of the order :

NEW YORK, March 18, 1880.

W. & Co., ——— st.

Order of ———

Present.

Date, February 26.

Price in gold. Terms, cash less 5 per cent. 30 days.

Subject to any alteration in the United States tariff and revenue laws.

Delivery of goods not later than May 1 to 10.

300 gross like sample given to us.

(Prices here named).

DEAR SIR : We beg to acknowledge receipt of above order, which has been accepted by our manufacturer at your limited prices. Thanking you for the same, we are yours truly.

Signed, W. & Co.

A. Under the New York rule, as defined in *Courtright v. Stewart*, 19 Barb., 455, the above was an executory contract for the sale of goods, and required a writing signed by the party to be charged. The acceptance signed by W. & Co., is capable of a construction by which they appear to stand merely as agents for the manufacturer, but we gather from the story of the transaction that they were in fact principals, and the manufacturer

was substantially a sub-contractor with themselves. Such being the case, there may be some doubt whether W. & Co. actually bound themselves by the statement that the order "has been accepted by our manufacturer," but we think that by fair, rational construction they did bind themselves, and are, therefore, liable for non-delivery of the goods within the specified time, in such damages, legitimately flowing from the breach of contract, as the buyer can prove that he sustained.

31. A lumber merchant contracts to deliver some lumber here in sixty days. The lumber is loaded at the South in due time, and if it had not been for a gale in which the vessel was lost, would have been delivered in time. Now the merchant claims they are relieved from the contract, as it was an act of Providence which prohibited them from delivering in time. Now we claim they are holden, as the lumber can be bought here (which of course will cost the merchant much more than he gets), and that the contract says nothing about "dangers of the seas," or coming from the South.

A. If a dealer sells a cargo of lumber to arrive and it fails to arrive he is absolved from the contract. But if he engages to deliver a certain quantity of lumber within a given time, he must do it or respond with whatever damages directly results from his failure.

32. A purchases of B 25 barrels of sugar. B refuses to deliver the goods. Can A compel B to deliver them, or can A compel B to pay the difference on the advance of the goods?

A. If the order and acceptance were verbal, and no consideration passed, B cannot be compelled either to deliver the sugar or to pay any damages for his refusal. If B sold the sugar and has no good reason for the non-delivery, he cannot honestly avail himself of the statute of frauds as an excuse for failing in his contract, but the law in the case supposed will not compel its performance. If the contract of sale was in writing or any consideration for it was given and received, then it may be legally enforced, and judgment recovered for all proven damages.

33. A buys a cow of B, price \$25. A says, "Keep her until next Wednesday, feed same as you have, and I will then come for her." Before Wednesday, however, the animal dies—no fault or carelessness of B. On whom does the loss fall?

A. There having been, as far as stated, not even a construc-

tive delivery of the cow, the loss will fall on the seller. A gentleman we know very well, sold a horse on Saturday, for \$2,000, the buyer to take him from the sale stable where he was kept, on Monday. In the interval the horse died from a sudden congestion of the lungs. The seller made no claim on the buyer for the money.

34. If I buy goods of a wholesale merchant on a credit of 4 months, and after I reach home (Albany) he sends me the goods with the bill marked "30 days," does my acceptance of the goods and bill without calling the merchant's attention at the time that the bill should read four months, make the contract due in thirty days instead of 4 months?

A. If the 4 months' contract can be proved, the entry upon the bill of "30 days" will not legally shorten the term.

35. A & Co., of New York, sell B & Co., of Boston, a parcel of goods of a refuse nature, "delivered at Boston," no delivery date mentioned on contract, but goods to be delivered when collected. Goods cannot be procured readily in the open market, their production being dependent upon the manufacture of other goods, but some can be had when produced. Goods to fill contract are shipped, and lost in transit. Cannot B & Co. require delivery of A & Co. as though no shipment had been made, and is there any law or usage which would justify A & Co. in refusing to make further deliveries under the contract? It is claimed by some that A & Co. having sold goods to be shipped when collected, and shipment having been made, they are thereby relieved from further deliveries under contract.

A. The answer to this will depend somewhat on the terms of the contract. If its fair interpretation simply require A & Co. to collect a given quantity of a certain article within a reasonable time and ship it to Boston, paying the cost of its delivery, then the shipment of the required amount with prepayment or provision for the freight, will fulfill the obligation, and no further shipment could be required in case the property is lost on the way. If on the other hand A & Co. have undertaken absolutely to deliver to B & Co. in Boston a certain quantity of goods at a certain fixed price, they must do it at whatever cost, or respond for the failure in the damages that result.

36. X, in New York, sells a lot of seed to Z in Rotterdam, with the conditions of cost, freight, and insurance. X insures the goods in New York, subject to 10 per cent. particular average, these being the

best obtainable conditions. The vessel carrying the seed meets with an accident, and the seed is damaged to the extent of 8 per cent. Z claims this amount of damage from X. Can X be held responsible for this amount, or for any damage at all?

A. The damage not amounting to the per centum limited by the policy of insurance, *i. e.*, 10 per cent. in the sum insured, no claim can be made on the underwriter. The insurance having been effected on the best terms obtainable, *i. e.*, subject to particular average if amounting to 10 per cent., the seller cannot be held responsible for any loss or damage falling short of these terms.

MISCELLANEOUS.

37. Having purchased at auction a number of barrels of eggs, which were sold as "fresh State eggs," I find upon examination, and after sending a portion of them to some of my customers direct from the auction room, that they prove to be rotten and unsalable, and most of them have been returned to me, very much injuring my trade. Let me know to whom I am to look for redress? While the auctioneer admits they were sold as I have stated above, and acknowledges that it ought to be made right, he claims that they were sold as represented by the consignee to him, and refers me to them. They (the consignees) refer me to the shipper. Of the three parties who, in your opinion, are liable?

A. Unless the representation amounted to a warranty, the buyer has no redress. The old rule of *caveat emptor* (let the buyer beware) applies to such transactions. But if the goods were sold as merchantable, and the buyer discovered their unmerchantable character within a reasonable time, the auctioneer is liable.

38. A man asks the price of certain goods, which is given him. He then asks the terms, and is told 30 days, with a discount of 5 per cent. He then purchases the goods. Now if he does not pay for them until 60 days has expired is he entitled to the 5 per cent?

A. If he is indulged without notice to the extent of 60 days he would have a plausible right to consider the conditions as waived in his case, and to claim the discount; but a formal notice at the end of 30 days will defeat such a claim.

39. A French vessel condemned in a foreign port was sold at public auction to an American citizen, who obtained for her a provisional register from the United States Consul, to reach an American

port under the United States flag. Cargo was given by parties disinterested in the ownership of the vessel. Invoice for the same was duly legalized as required by law by the Consul. On arrival here the vessel was seized, together with the cargo, by the United States sheriff for an infringement of the navigation laws, but was released on bonds being given by the owner of the vessel and the consignees for the cargo, the owner and the consignees becoming surety for each other on the bonds. The Government having now released the vessel and cargo upon payment of \$250 fine conjointly, we wish to know if the vessel cannot be held responsible for one-half the fine supposed to be due from the cargo? The owner of the vessel has since failed, and the other half due from the vessel is claimed from the surety on the bond. Can the surety not hold the vessel again liable for this part of the fine? The decision of the Government, inasmuch that it does not sustain the act of the Consul, seems strange. The question now, however, is who shall pay the imposed fine, the vessel or the cargo?

A. We doubt if the vessel can be held to pay the portion of the fine levied on the cargo under the circumstances narrated.

40. A sells to B a bill of goods to be delivered in bond at a certain price, less estimated duty. In the interval between the date of contract and stipulated delivery the duty on the article (25 per cent.) has been abolished. Who is entitled to the profit created by the unexpected legislation? If the duty, instead of being abolished, had in the same period been raised 25 or 50 per cent., would the purchaser be bound to abide by the previous and lower rate?

A. The seller is merely bound to deliver in either case at a price that will enable the buyer to receive the goods duty free.

41. A owns a storehouse on navigable waters and is a buyer and seller of grain, usually shipping by canal to the New York market and occasionally selling at his storehouse. B, C, D, and E are farmers, and not being satisfied with the price that A is willing to pay them for their grain, conclude to put it in store with A, and do so. F is a grain buyer from New York and buys of A at his storehouse a boat load of grain, A representing the grain as his own, and F pays A for the grain. Two years after the transaction B, C, D, and E notify F that a portion of the grain that he paid A for was theirs and demand pay of F. A in the meantime has failed. Is F holden to B, C, D, and E for their grain stored with A?

A. If F is notified within a reasonable time he can be made to pay for the grain, since A cannot give a good title to the grain, it belonging to B, C, D, and E, sent to him for storage and not for sale. The lapse of time leaves it a question of due diligence. If the owners of the grain knew that F had bought it, and waited

two years before they laid any claim to the proceeds, there may be some question whether they are entitled to recover.

42. Suppose A to buy a bill of goods on July 12, and to be dated as August 20, would all subsequent bills (by the general rules of business) necessarily be as August 20 ?

A. The agreement to date a single bill thus far ahead would not carry with it the date of all intermediate bills, unless there was some agreement or understanding to this effect.

43. A, B & C are parties having mutual business relations. A has been in the habit of buying goods of B and paying cash for same when payment has been due. Now C holds some notes made by B and offers the same to A at a good discount. Has A the right, without any understanding to that effect, to turn over said notes to B in payment for merchandise, and can he compel B to accept same ?

A. If the notes given by B to C are negotiable, he has the right to sell them to A ; and when due in A's hands they are a legal offset to A's indebtedness to B up to their face value. This is "the law of the case;" but if A purchased goods of B with the distinct understanding that he would pay him the money, and there is anything in the purchase of the notes that looks like a trick or device, by sharp practice, to take advantage of the seller in the matter of payment, the moral right would not be quite as clear.

44. In the sale or mortgaging of vessels does the law require that a wife shall relinquish her dower when the vessel is in name of husband, or if in name of wife must the husband join in the execution of conveyance ?

A. A ship is not real estate, and a wife has not a right of dower in the property.

45. Is it a law of the customs department that all bills of sale of vessels must have a notary's certificate attached ? For instance, a merchant and shipowner well known to the custom officers where he resides and does business, and who buys and sells vessels frequently, sells a vessel to a party who is also known to these officers. Is not the merchant's signature, done in presence of the Collector, sufficient without the notarial certificate ?

A. The merchant's signature is not sufficient, and the act of Congress is imperative : "No bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage, or other incum-

brance, of any vessel, shall be recorded unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgments of deeds."

46. D orders from V 20 reams of paper, 20 x 24 to weigh 24 lbs. to the ream, at eight cents, to be delivered in bundles, strongly wrapped up; the paper being intended for shipment to a distant port. The paper arrives in exceedingly heavy wrappers, the 20 reams weighing gross 463 pounds, while several sheets of the paper taken from the paper bundles indicate on the paper scales only 22 pounds to the ream. D promises to pay at the rate of \$1.76 per ream (22 x 8 cents), while V pretends that he has a right to charge 453 pounds at eight cents, thus charging for the common wrapper the same price as for the paper. On shipping this paper D runs the risk of having it rejected by his client as too light, and this fact alone should induce V to be less obstinate. Now please state if V has a legal right to claim pay for the 463 pounds.

A. It is customary to include the wrappers and cord in the weight of printing paper, although it ought to weigh enough to clear all such tare. D can take the lot at 463 pounds, or reject it as not coming up to the weight ordered.

47. Contracts have been made in the United States for arms, ammunition, leather, metals, provisions, etc., for the use of the armies of Russia and Turkey, and the articles have been shipped direct to their ports; but in case of war they will be shipped to a port of France, Belgium, or Germany, to be forwarded by rail across their territory. Arms and ammunition are ready for use, also provisions; leather and metals are for them to make war material. These contracts are made with individuals, but it is known that they are for these governments. The ownership is in citizens of the United States until they arrive at their destination. Do they infringe any neutrality laws by shipping these articles to neutral ports, and are they liable to capture on the ocean?

A. If really intended for the use of Russia, under a contract, the goods would be liable to seizure provided they were shipped after the war begun, although the contract was made before the war. But if actually shipped before the war, the legal title being still in the shipper, they would be exempt. Such a shipment would not be a violation of any statute in this country.

48. A sells to B an invoice of merchandise stored at a United States bonded warehouse, renders invoice to B, but as the invoice cannot be transferred in bond (according to a new regulation), it remains in the bonded warehouse until delivered at a later indefinite period, in

A's name. A holds an insurance policy for the value of the goods, reading as usual, "on merchandise, etc., his own property or held by him in trust, or on commission, or sold but not delivered, and agrees to keep the goods insured under this policy, without transferring the policy to B." Now the question is, whether A (the seller) can recover, in case of loss by fire, under the circumstances (of course to indemnify the buyer), or whether the rendition of invoice is considered an actual delivery?

A. Under the conditions named, the insurance would apply to the goods in case they were burned or otherwise damaged by fire.

49. If we sell a bill of merchandise and stamp on the contract of sale and our bill, "payable in legal-tender notes, commonly known as greenbacks," can we compel the payment in greenbacks, or can the buyer pay in legal tender silver dollars or silver certificates?

A. If the mode of payment is specified in, and made part of the contract, it can be enforced; but the mere stamping of such a clause on the paper will not make it a legal part of the agreement.

PURCHASER.

50. A salesman visited me last Saturday and showed me a sample of goods on which I gave him a verbal order. The goods were delivered to me Monday; on examination they turned out not equal to sample. I immediately returned them to the manufacturer, who refused to take them back. I wrote to him that the goods not being equal to sample I held them subject to his orders and at his risk. Am I right? Can he make me pay for the goods, and what course am I to follow?

A. The statement being substantiated by sufficient evidence, our correspondent can keep the goods on storage until called for. The seller may sue for his pay, when the facts stated may be proved and he cannot recover.

51. A friend in Canada did last year three transactions with a house in Pennsylvania, always for cash; that is, the buyer had to send the cash after the receipt of the goods. This year he sends an order to Canada under the same conditions; the goods were shipped on March 8, and arrived at the end of March. A few days after this the consignee assigned his property, and his attorney wrote to my friends in Canada saying that he offers 10 per cent. to the creditors! In Canada and in France there are laws saying that a merchant has no right to buy when he is behind, and has to refund or give back all goods received within 30 days of his failure. It is clear that it is a fraud to

receive goods three to four days before you assign, and offer 10 per cent. in payment. But has the creditor a right to take back his goods, or can he have the man indicted for a fraud? Or has he to be satisfied, and take the 10 per cent. offered?

A. If there were no other circumstances attending the transaction, indicating an intention to give credit, the law interprets such a sale to mean cash on delivery. (*Southwestern Freight, etc., v. Plant*, 45 Wisconsin, 517.) Where payment and delivery are agreed to be simultaneous, and payment is evaded, omitted, or refused by the purchaser on getting possession of the goods, the seller may immediately claim them. This statement is supported by numerous authorities, among them the Pennsylvania case of *Henderson v. Lauck*, 21 Penn. St., 359. In *Adams v. O'Cohnor*, 100 Mass., 515, Judge Gray said: "The sale to the defendants having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers until the terms of sale had been complied with." See Benjamin on Sales, second American edition, sec. 320, and copious notes. In *Backentoss v. Speicher et ux.*, 31 Penn. St., 324, the Pennsylvania Supreme Court said: "A sale of goods for cash is, strictly speaking, a sale on condition, * * yet if the vendor acquiesce in a possession obtained in disregard of the condition, he waives it, and though he may recover the price by action, he cannot recover the goods in specie." In the same case the Court said that in Pennsylvania, contrary to the rule in New York, "where there is a sale of goods and delivery of possession, even though the buyer intends at the time not to pay for them, and conceals his insolvency from the vendor, it is not a cheat that will avoid the sale."

The Canadian Insolvent act makes the purchase of goods under such circumstances a crime punishable by imprisonment, provided that in suit for the recovery of the money due on the contract, it shall be the judgment of the court the transaction was fraudulent in intent. (*Clark's Insolvent Acts*, 352, sec. 336.)

On the whole, our conclusion is that the case is not free from doubt as the result of an attempt to follow up the debtor, but if the creditor is willing to take some risk for sake of punishing

the fraud, and possibly recovering his property, there is sufficient ground upon which to proceed.

52. A sells B a bill of goods January 8, on half four and half six months' time from February 1. Goods are shipped and billed January 8, with "terms half four and half six months from February 1." B receives goods a day or two afterward, and writes, January 12, that the goods should not have been shipped before February 1, and also claims a reduction on some of the goods. The reduction is granted, and B keeps the goods and pays for them in due time. Was not B a debtor to A for amount of bill, less the allowance, on the day the concession was made, or did he only commence owing it February 1?

A. The date of B's indebtedness is the day of sale and delivery. The fact that the credit is to be extended to the 1st of February does not fix the latter as the date when the obligation begins; nor does the date of the concession alter the terms of the original credit.

53. Our salesman sells by sample to a firm in Chicago 20 casks Cadiz wine. Wines are shipped and promptly paid for. Just two months subsequently, when market price of the wine has fallen at least 50 per cent., the Chicago house reship the goods to us, with the request that we take them back and remit check for amount of invoice, they claiming goods to be impure and not like sample. Our invoice plainly read that all claims for damage or deduction must be made within five days after receipt of goods. Can we be legally compelled to take back goods and refund money after so great a lapse of time?

A. Unless some satisfactory explanation of the delay can be given, the lapse of time is sufficient to prevent any recovery by the Chicago house.

54. We sold to a party a lot of goods, 60 days' note. On our repeated demand for it, we do not get a satisfactory reply. Must we wait until the 60 days are gone, or have we a right to enforce the contract before the bill becomes due?

A. If the contract to give the note is clearly proved the same may be demanded, and if it is refused, the purchaser may be sued for the debt, and thus be compelled to tender the note and cost or pay the money.

55. A, a merchant in London, agent for several houses abroad, sells to B, also of London, a cargo of wheat, in the name of C, a commission merchant here, without the latter's consent, and at a price below the current rate here, hoping that the market would decline later

on. Prices, on the contrary, having advanced considerably, and the shipment not being effected, has not B a right to claim damages from C, from the mere fact that A is in the habit of selling cargoes as C's agent, though the latter can show that he did not authorize A to sell the cargo in question?

A. The buyer B has no claim whatever on C, under the circumstances described.

56. A sells B, through a broker, goods to arrive, and which are guarantied to be equal to sample shown, which B retains. On arrival of the goods, it being impracticable to break bulk and examine contents of packages, B ships the goods to his customer, who is a consumer, and there the packages are opened, showing the quality of the goods to be inferior to the sample, as well as having all appearance of false packing. 1. Does not the act of the broker in selling the goods by a sample handed him by A bind A? 2. If A refuses to adjust the damage has not B good cause for action?

A. The above statement being duly established in every particular would give B a good cause of action. But if the proper examination of the goods was not wholly "impracticable," only inconvenient, and a longer time elapsed before the claim was made than the buyer was fairly entitled to, then he has legally waived his right to a reclamation. He might still claim, however, for a false quantity, if this is what is meant by false packing.

57. A called on B and asked to be given some samples to sell on commission. A sold some merchandise to C which is delivered by B. A again calls on C and is paid the value of the merchandise delivered to C, but fails to hand same over to B. Can C be compelled to pay for the merchandise to B after having once paid A for same, although no notice is given to C that A has any authority to collect?

A. Authority to sell by sample is not necessarily authority to collect the proceeds of the sale. The proper way is for a buyer to pay in a check to the order of the principal. In the case described if B has not in any manner given to A any color of authority to receive the money, C must pay for his purchase again.

58. We shipped a case of goods on the S ——— and from the fact that the vessel sunk, have every reason to believe that the goods are lost. On whom does the loss for the value of the goods fall, in the event of no responsibility being attached to the owners? The goods were sold on the terms as previous shipment, viz.: deliverable on dock.

A. If the goods were deliverable on the dock here with no obligation to insure, the loss falls on the buyer, the water transit being at his risk.

59. Does the acceptance of a purchase note and order from brokers of a lot of coffee stored in warehouse place any risk upon us until the goods are taken away, provided we have no notice regarding storage and insurance?

A. If the buyer accepts the order on a warehouse as the delivery of the goods he is then the owner and responsible for them; but if he does not, the seller is responsible until the buyer has had a reasonable time in which to remove them.

60. If I buy at any place of business, in good faith and in the regular way, according to samples shown to me by some party, a lot of produce lying at some depot here at the time, take this in and pay for it, can I be forced to give up my right in said goods and deliver them up to some other party who claims to have a chattel mortgage on farm or acres on which said produce was raised? Can I not justly presume that the party who has the goods here at the depot and has control of them, is the rightful owner, or am I obliged to make a long and tedious inquiry first at the place where the goods came from in order to be safe? If such was the case, would it not make safe purchases of the nature above stated almost impossible?

A. The buyer of everything but negotiable securities (which are excepted from the rule) must beware for himself. If the seller has no title, and no authority to sell, he cannot give title to the buyer. A man goes to a jewelry store and buys a watch which the jeweler did not own (say it was stolen or left with him for repairs) and pays his money for it, the real owner can come and take it away from him, and unless he can recover of the seller the money he paid is lost. A produce dealer receives two cargoes of grain, one on storage and the other for sale. If he sells both cargoes, the owner of the one left on storage can recover the property or its value of the buyer.

61. A party sells to us a lot of goods; shortly afterward we are notified by the patentees (third parties) that we must not sell the articles because they are patented. Can we be compelled to keep and pay for the goods, or should we return them?

A. If the articles are really subject to the claim of a patentee, so that the buyer cannot sell them, he may return them and refuse to pay for them. But if the claim is fictitious, then it is

a serious question whether the seller may not insist on the fulfillment of the contract, the notice to the contrary notwithstanding. A very few years ago all the dealers in a certain trade had unwittingly purchased into a lawsuit in this way. They laid in a stock of articles about which there was a dispute between two rival patentees. After the goods had been sold by one claimant, the purchasers were served with a notice from the other claimant. Some had resold part of the property ; others offered to return them, and were refused, the seller declining to take them back, but undertaking to defend for his customers. At last, after several hundreds of suits and cross suits and actions of all kinds had been inaugurated, the case was settled.

62. We have been executing the orders of a customer for a certain class of goods of our manufacture, at uniform rates. Early last month we received from him a similar order, but with a discount specified thereon, which we could not allow, and if this had been noticed at the time, he would have been at once notified to that effect and execution of the order withheld, but our order clerk overlooked the said discount specification, and goods with invoices were forwarded under previous conditions. About ten days later we received the customer's remittance for the invoice with the said discount deducted, which directed our attention to the omission of our order clerk. We immediately returned the remittance, with the proper explanation, but it was returned to us the party insisting upon the discount being allowed. On the 21st ult., we again returned the remittance with a full explanation why we could not accept it and offered the alternative of returning the goods. We did not hear from the party again until to-day, when the original remittance is again sent us and the discount insisted upon. We shall again have to refuse it, as for certain reasons we cannot accept it unless legally compelled. We claim morally, that our customer is in the wrong, because on receipt of the invoice he should have returned it for correction, and in case of our refusal, place the goods at our disposal ; failing to do this, he accepted the goods and invoice on our conditions.

A. If there were no other elements of contract than such as are stated in the above recital, the minds of the parties never met, no contract was formed, and the customer must pay for the goods at the invoice rate if he does not accept the option offered him to return them.

63. A lady bought a sofa of a dealer. She bought it on installments. She paid her dues every month to the dealer, but before she had the amount paid up she sold the sofa to another dealer ; but this

dealer she sold it to did not know she bought on installments, and did not know that the amount due on the sofa was not paid up yet; so that when the original dealer heard that the sofa was sold to another he seized it from his store, and told him if he wanted to keep it he had to pay \$10. Did he have a right to seize it from his store, and make him pay \$10 for it, this dealer not knowing it was bought on installments?

A. In a conditional sale of this kind the property in the goods does not pass until the conditions are performed. The lady, therefore, had no title to the sofa, and the seller had the right to reclaim it wherever found, just as if it had been stolen. (Benjamin on Sales, sec. 320, note d.) The original owner may be forced to his action at law for the recovery of his property, if the present holder chooses to contest the claim.

64. I bought \$100 worth of goods on the installment plan, and trusted entirely to the seller. I have paid about half the amount, and I now find I am swindled. Is there any way I can have the goods valued, and compel him (the seller) to accept what is just and fair? I want to do right, but don't like being swindled. He holds a chattel mortgage, and if I stop payment I suppose he can take away the goods.

A. If the victim can prove that the goods delivered are not equal in value to those exhibited to him when the purchase was made, he may stand a suit and set up that defense; but if the goods are the same, he has no remedy, unless the fault was latent, that is, not discoverable on mere inspection, or unless there was some warranty, actual or implied. An implied warranty might arise if the article was designed to accomplish a specific purpose, and was unfit therefor. But it must be specific and not a general use on which such a warranty can be founded. The seller of a cheap piano, for example, does not warrant by implication that it will produce enduring music, and the buyer of such an instrument has no remedy when he gets his purchase home and finds that it is practically worthless.

65. What kind of a statement should we ask of a customer in order that we may be able to punish him in case his representations to us were false concerning his condition? Would a verbal statement be sufficient, and entered in statement book at the time?

A. The verbal statement would be sufficient if its terms were distinctly recorded, and legal proof can be made of the exactness

of the record; but a written statement is less liable to be contested. The items of capital, assets, debts, and all the evidence of solvency should be made as positive and explicit as possible.

66. A buys a horse of C's wife while C is away from home, which horse C wants to sell. A takes the horse home with him. The next morning C comes with B and demands the horse or \$10 more, claiming that he had sold the horse to B the morning before and received \$10 on account. To whom does the horse belong?

A. As between A and C, the former can legally hold the horse; as between A and B he also has title, unless there has been some constructive delivery to the latter before A took possession.

67. We are buying wheat direct from farmers, and have verbally agreed with a number (on their promise to hold their wheat for us) to give them as much when they are ready to sell as will any other dealer. Since the rapid decline in wheat, other dealers have been in the market, and on the 22d of January offered a farmer (with whom we had the above promise or agreement), a certain price for his wheat, which he refused to accept, and immediately wrote to us stating that if we would give him a certain advance on the above price he would sell to us. We received the letter on the 24th January, when wheat had materially declined. We immediately wrote, informing him of the decline in wheat, and stated that we could not give him the price he was offered on the 22d, and offered him the market price on that day the 24th, which he refused, and claims that we are bound to pay him the price he was offered on the 22d inst. In making the promise we intended to convey the idea that we would give as much for wheat as would any other dealer on the same day. Are we honorably bound to take the farmer's wheat at the price he was offered two days previous to the day he informed us he was ready to sell?

A. All that the buyers are honorably bound to do is to pay the market price on the day the wheat is delivered, this being ascertained under the rule by the highest rate at which the same wheat then and there can be sold to any other bona fide buyer.

68. B purchases of A an article for \$100, but has not the money to pay for it at the time, and says to A, "I have sold these goods and will take them to my customer who will pay me and I will be back in an hour and pay you." Upon these representations A let him take the goods, knowing at the same time B was bankrupt, with no credit or means. During the day B returns and says he did not receive the money. Accidentally A meets B's customer, who says that he paid him cash, on delivery of the article, and up to this time B has not paid

A. Has B by this transaction made himself liable to arrest and punishment?

A. The swindler has not made himself legally liable to arrest and imprisonment. He did not make false and material misrepresentations to obtain the goods; but he obtained them by false promises, which are not actionable.

69. A sells a bill of Havanna tobacco in bales to B on three months' time. B examines the tobacco in the warehouse, accepts it, and it is then reshipped in bond to California. Two or three days before the bill is due B tells A that two or three of the bales are damaged, and awaits further particulars before making a claim. A makes no promises, and B pays the bill at maturity, stating that he is instructed by his partners not to do so. Ten or twelve days afterward B receives a specimen of the damage, which he shows to A, and reads to him a letter received from his partners in California, claiming damage on thirty bales (nearly half the lot), and offering to sell them for account of A. This A declines to accept, and furthermore, refuses to allow any claim, on the ground that to the best of his belief the tobacco was sound when sold, that it was examined and accepted by B, and that the seller cannot be held liable for goods that are perishable in their nature three months after he has ceased to have any control of them. B contends that the claim is morally and legally just. A asserts that he is not liable.

A. If the case is fairly presented in the above statement, we see no proper ground on which B can base any claim upon the seller.

SELLER.

70. We receive an order by telegraph to sell a certain quantity of wheat to arrive at a certain price. We reply that we cannot get that price but can sell at a certain lower price. Later we do sell at limit but the owner of the wheat claims that our reply canceled his order to sell and that therefore we had no authority to make a sale until we had consulted further with him.

A. The reply suspends the original order, and the person addressed must obtain fresh authority, or he sells at his own risk.

71. If we sell a bill of goods "as are," said goods supposed to be sound, and a reasonable time having passed, the goods are examined and found damaged, can the buyer be forced to take the goods and pay for the same as if sound? The goods were known to be liable to damage.

A. If the quality of the goods was misrepresented by the seller the sale "as are" will not protect him; but if there was

no such misrepresentation, and the goods were sold "as they are" the buyer cannot reject them for damage if delivered to him in specie.

72. We ship certain goods to a distant city, having an understanding that we are to draw at sight, with bill of lading attached to draft. We ship the goods marked with our customer's address, and make a sight draft accompanied by the bill of lading. The draft was not honored, and the goods were delivered to the consignee, who proved to be a swindler and irresponsible. Have we recourse upon the freight line who delivered the goods without presentation of the bill of lading ?

A. Our correspondents have no recourse. The way to secure the draft by the bill of lading is to ship the goods to order and then to indorse the bill of lading deliverable to the ultimate consignee on payment of the draft. But if the goods are shipped to John Smith, and the carrier delivers the property to John Smith, he has done all that he undertook to do, and the fact that Smith did not possess or deliver the bill of lading in such a case is of no account.

73. A living here buys an engine of B in New York, pays \$300 cash and gives notes for the balance \$900, and takes a receipted invoice. B learns soon after shipping the engine (consigned to A) that A has failed and made an assignment. B comes here to look after his interest, and finds that the engine has not been delivered to A, but is in the railway company's possession, subject to freight charges. B pays the charges and reships the engine consigned to himself in New York. Other creditors claim that the engine was the property of A, that the railway company had no right to deliver it to B, and that B is a creditor to A to the amount of \$900, and must take his chances with the others. Evidently B has "nine points" in his favor, but how about the tenth as claimed by the other creditors ?

A. B has the legal right to stop the engine in transitu, and to reclaim the property as his own at any time before the delivery has been completed.

74. A sells B through a broker a bill of goods ; the broker sends both A and B a contract ; the goods are delivered and A renders B an itemized bill for the same ; A receives B's check for the amount of bill, giving a receipt in full. Two or three days later A discovers that a mistake has been made in the bill rendered ; a portion of the sound goods having been charged at the damaged price, which was two-thirds of the price of the sound goods. As soon as the error was discovered,

A sent B a corrected bill, with the request that he (B) would pay the difference. This difference B refused to pay, saying that he had already disposed of the goods to C, to whom he had shown A's first bill, and that C had agreed to give him (B) a certain percentage of the face of A's first bill for his (B's) profit. Be good enough to tell me if you think A's claim a just one, or your opinion on the case generally.

A. If B still holds the goods he would be bound to rectify the error; and if he can obtain a readjustment of C, both B and C would be morally bound to make the correction. But if the property has gone beyond B's control, and C will not consent to readjustment, A cannot enforce it. It is a settled rule that where one of two parties must suffer from an error, the one who made it must bear the burden.

75. A bought a bill of goods of B, understood to be sound at market price. When the goods were retailed to customers they were returned as being unfit for use. A sent the goods back to B with a check for what had been used, but neither would be received, and suit has been brought in the case.

A. If the defect in the goods existed beyond controversy when they were bought, it then becomes a question whether it might have been discovered at once by due diligence on the part of the buyer, so that he could have made his claim within a proper limit of time. If so, then he should not have left it for his customers to find out the unfitness, but ought to have ascertained it himself. But if the defect existed and could not be discovered until the goods were retailed for consumption, we think the buyer may then return them and make a legal claim.

76. I purchased in a neighboring State a pair of horses, second-hand buggy and harness, the seller assuring me of the perfect soundness of the horses, and of their ages at six and seven respectively. Not having cash sufficiently to pay for them, I gave my check, which was accepted; I then left, intending to drive home. I met on my way a man who had been in charge of the horses, and who knew nothing of the transaction. I asked him the ages of the horses and condition of the same, and I had certain proof that I was grossly deceived, and the seller was guilty of misrepresentation. Could I have refused to pay the check, and would that have been honorable in me? Could he compel me to take the horses and pay the price agreed upon? If I was on the road could he have caused my arrest on learning that I had ordered the bank to stop payment? I may mention here that the seller had telegraphed to my bank to know if check was good, which was answered in the affirmative.

A. If the horses were warranted as described, our correspondent on learning that he had been deceived would have been justified in stopping payment of the check, and returning the property. At any rate he could not be arrested legally for taking such a course.

77. A, an importer, receives notice from his correspondents in China that they have bought for his account and will ship by certain vessel named 100 cases cassia. B, a broker, sells to C the 100 cases cassia to arrive by certain vessel named, deliverable on arrival. Next vessel from China brings A word that cassia was inferior quality and has been rejected, and therefore is not shipped by said vessel. Is A bound to deliver C the 100 cases cassia on arrival of said vessel, or pay C difference in market value?

A. The seller, in the case cited, is only under obligation to deliver the cassia in case it arrives as named in the agreement. It is not a wager (all the authorities say) that the goods will arrive, but a contract to sell and deliver them when they arrive. "A sale on arrival by a certain vessel, is held to mean on the arrival of the goods, and not the vessel only; and this construction will always be put upon the conditions, unless the language used in the contract is so plain to the contrary as not to admit of it. For the courts are unwilling to assume that the contracting parties meant to enter into a mere wager. In fact the arrival of the goods by that particular vessel is held to be a condition precedent to the vendor's obligation to deliver."—*Lovatt v. Hamilton*, 5 Mee. & W., 689; *Shields v. Pattee*, 2 Sandf. 262, 4 Coms., 122. The latter was a sale of a certain quantity of pig iron "On board the ship S," then at sea. It turned out to be another quantity of pig iron. The court held that the writing was not a sale, but an agreement to sell conditional on the arrival of the iron; and the iron not being of the quality required the bargain was at an end.

78. A gives B a quotation for a lot of goods. B promises to consider the offer, and let A know in case he decides to accept. Shortly after the interview between the parties A learns by cable that the market has advanced, and immediately writes B a note withdrawing his offer. Meanwhile B's messenger is on the way with a note to A accepting the goods. The messenger crossed. Is A obliged to let B have the goods at the price quoted?

A. A is not obliged, under those circumstances, to let B have the goods at the first quotation.

79. A sends to B at his request a lot of goods, which were deliverable to an employee of B (in his absence), who says "I do not think these goods will suit Mr. B, but I will show them to him and if they suit he will keep them." The next day another employee of B calls at the store of A for some other goods, as is frequently his custom, and is asked by A, "How about those goods; did they suit B?" This employee answers, "Oh, yes, they are all right; he will keep them, as they are scarce and he can get no better." The next day, B having seen the goods, and not desiring to keep them, returns them to A, who declines to take them back under the circumstances, and insists on B keeping them. And A has incurred legal expense to a small amount, and says that B should pay that also, or a portion of it. Is it right that B should keep the goods, and if so, should he pay the legal expense incurred by A?

A. We cannot of course tell what special or implied authority B's employee may have had to convey B's acceptance of the goods; if there was such authority B is bound by it, and will be held to pay the price, though not, we think, any part of the legal expenses mentioned, that being a damage which would be legally classified as too remote. But if B's employee, as appears most likely, had no authority to give his employer's acceptance, then the question depends somewhat upon the nature of the goods, which would influence the legal conclusion whether or no the two days they were retained before rejection was a "reasonable time" for their examination. If it was more than a reasonable time in point of law, then B is bound to keep and pay for the goods; otherwise he had the right to reject and return them.

80. A, a merchant of New York, authorizes his brokers C and D to buy a lot of goods held by E of Philadelphia, if they can get them at five cents per pound. C and D forward the offer to E by mail, subject to a reply before noon the following day by wire. On the following morning C and D receive a telegram from E accepting the offer, and about ten minutes after the receipt of this telegram, and before A has been notified of said acceptance, a second telegram is received from E saying, if sale is not closed advance price one cent per pound. Is A entitled to the goods in accordance with E's acceptance contained in the first telegram, or does the second telegram following so soon after the first annul the first, and should the goods only be sold at the advance of one cent per pound?

A. The seller E has the right to revoke his acceptance at any

time before it has been communicated to A, and the bargain closed thus.

81. A firm of commission merchants here order from a commission merchant in an adjoining city a lot of merchandise, such being received by him daily on consignment from his country shippers. This and other orders are given, with instructions to make good selections, bill same at selling price of that day and send bill of lading and make sight draft for same. These orders were filled as above, goods were received and paid for upon representation. Upon sending a similar order the following week the goods were sent forward as before by the same house, but to the charge for goods and cartage is added $2\frac{1}{2}$ per cent. upon the amount of bill. This was new, no such charge being mentioned in any prior transaction, the goods shipped being those received by the seller on commission. The reason now assigned for such charge is that if buyers bought the same goods in that market through broker they would have to pay him $2\frac{1}{2}$ per cent for buying the same. Is such a charge of $2\frac{1}{2}$ per cent. by seller just and legal, the same not having been mentioned in any prior transaction?

A. We are not prepared to say that if the sellers were obliged to exercise any unusual care in the selection, and were actually troubled more to fill such an order than to make the sale of the goods consigned to them in the ordinary way, they would not be entitled to a brokerage sufficient to compensate them for the difference. We think, however, that after filling a similar order for which there was no such charge they ought not now to make it without previous notice. We doubt if it could be legally collected, and it hardly seems equitable, unless, as we have said, the "selection" gave much additional trouble.

82. A orders goods of B for C, A requesting B to send goods and attach bill of lading and draw through a bank. The goods having been received by C, C having paid A and A to the bank, the bank fails after A has paid and before the bank pays B. A does not guaranty B but simply requests B to attach and draw. The question is: Does A or B lose in the above case?

A. The loss will fall upon B unless he can collect of the bank.

83. We order from a house in London some goods, which they ship, and without any instructions from us get insured and charge us with insurance. The goods are damaged on voyage by shifting of cargo. When we ascertain the damage we send the necessary documents to the shippers with which to collect insurance. They present them to the insurance company, who call their attention to a clause in

the policy by which they are insured only in case of the vessel being wrecked or burnt. Now whose loss is it? We supposed by their charge for insurance without any qualification that they were fully insured against any disaster.

A. If the damage resulted from negligent stowage, or from any cause not excepted in the bill of lading, the ship is liable. Without instructions the London house was not bound to insure; and it was not legal negligence on its part, therefore, to take out a policy which, if its terms are correctly stated, excludes various risks usually covered by marine insurance. If, however, cable advices were sent, that the goods were insured, and the consignee was thus led to suppose them fully covered, and to neglect insurance on his own account, this might involve the London house in responsibility for the damage. Otherwise, and the ship cannot be held as above suggested, we do not see but the consignee will have to stand the loss himself.

84. A purchased of B July 1st 50 lambs at \$4 per head, paid \$20 on them, and agreed to take them away September 1st, and pay the balance. On September 1st A went after the lambs and 20 of them were dead. Now is A or B the loser?

A. If there was an actual sale and change of ownership, the lambs being selected or so identified that they became at once the property of the buyer, they remain with the seller at the buyer's risk. "Leaving the property in the hands of the seller—if the pledge perish without the fault of the seller—he cannot be called on to return the pledge, but may still call on the buyer to pay his debt."—*Parsons on Contracts, volume 1, page 529.* "The seller is to keep the thing sold until the time for delivery with ordinary care, and is liable for the want of that care, or of good faith; but if he does so keep it he is not liable for its loss."—*Ibid, 532.*

SETTLEMENT OF ACCOUNTS.

1. Two parties agree to order goods from abroad, each taking one-half interest in the importation. One of the parties attends to the ordering, providing funds, etc. The goods arrive, and by agreement an interest in them is sold to a third party at a stipulated price, and the whole quantity then sold on joint account, resulting in a profit. Statements are rendered by the orderer and receiver of proceeds to each of the parties, showing net profits to their credit. It so happens

there is a running account between the orderer and the third party, who, in the meantime fails, and is unable to pay a debit balance against him. What is the proper relation of this credited amount, between the two original parties?

A. If No. 3 has paid for the interest which has resulted in a profit that stands to his credit in the hands of No. 1, we do not see that No. 2 has any further connection with it. The question then is, how far No. 1 may use it as a set off to the debt which No. 3 owes him. If the debt has matured, and both debt and credit are in the same name, we see no reason why this may not be done.

2. In settling account by note is it customary to include the interest on the three days' grace?

A. If the account bears interest it is reckoned on the grace; but if the note matures when the account is due, the debtor obtains the three days' extra time as a bonus for executing the written obligation.

3. If we buy a bill of goods, say \$1,000, terms four months or 6 per cent. off for cash, and we pay cash, \$500, for what amount should our account be credited?

A. The buyer should be credited such a sum of the principal as at 6 per cent. discount will net \$500, and this is \$531.91.

4. I buy a bill of goods from a firm and they deduct $2\frac{1}{2}$ per cent. from the amount for cash. The goods are delivered without a demand for payment. Two weeks later I voluntarily pay the bill, when they refuse to allow the $2\frac{1}{2}$ per cent. Should I lose the discount, when I stood ready to pay at any time on demand? I accept the bill as rendered, and it is through no fault of mine that the terms are not complied with.

A. The whole question turns on a single point not stated, viz.: When was the bill payable to secure the benefit of the discount? Our correspondent is mistaken in supposing that because no demand was made for the money, it was not his fault that the terms were not complied with. A debtor who knows where his creditor is to be found is bound to tender him the money to secure the benefit of a discount limited to a given date. Indeed, in all cases, the debtor, whether he owes rent, interest, or principal, is bound to seek out his creditor and pay the money to him, with-

out waiting for a demand. While this is its legal aspect, the ordinary custom is to allow the cash discount where payment is made within a few days of the purchase, and on the first demand for it, and it seems as if a little sharp practice had been used by the sellers, unless the time was absolutely and positively limited to the day of purchase, or within 24 or 48 hours of it.

5. A, of Chicago, sells to B, of New York, a quantity of merchandise. The price is made delivery in New York, less 5 per cent. for prompt cash. B pays the freight. In settlement B remits amount of invoice less 5 per cent., and less freight. A claims that the 5 per cent. should be deducted from amount of invoice after deduction of freight. Who is correct?

A. If A had himself paid freight in advance, would he have deducted it from his invoice before taking off the five per cent.? It is clear that he could not, and B is right.

6. We are buying goods from an English house through an agent in this city, and we pay in sterling bills; during the summer the agent called upon us and asked for payment on account in dollars. We gave him \$4,000. Some two months later we get an account current and find (for the first time) that the agent had converted the dollars into sterling at the rate then current. To this we objected on the ground that we had not authorized him to buy the exchange and that it takes a mutual agreement for such conversion. We claim that therefore the conversion has yet to be made.

A. If the money was given as a payment, we think our correspondent is wrong, and the price of sterling on the day the money was paid fixes the rate, unless there was some stipulation to the contrary. If the money was lent to the agent, the same to be converted into sterling and credited on the order of the lenders and at their option, then the latter have the right to say when the conversion shall take place.

7. Will you please decide when an open account falling due on Sunday or on a legal holiday, becomes due? One of your leading sugar refiners writes that "all bills or debts of any kind (on open account) falling due on Sunday or legal holiday, are payable on the next following secular day." Another large refiner of your city writes, "bills falling due on Sunday are payable on Saturday." We think that you have heretofore decided that open accounts due on Sunday are payable on Monday.

A. All drafts, promissory notes, and other negotiable securi-

ties, maturing in this State (N.Y.) on Sunday or other holiday, are payable the previous secular day. All interest coupons, rents, and open accounts, falling due on a holiday, are payable the following secular day. We presume that the person above referred to, who wrote that "bills falling due on Sunday are payable on Saturday," used the word "bill" in its English sense, defined by Webster to be "an obligation or security given for money, under the hand, and sometimes the seal, of the debtor, without a condition or forfeiture of non-payment." To "give a bill" in England is equivalent to giving a promissory note or acceptance.

SHIPPING.

BILLS OF LADING.

1. Last July a ship was chartered for London under a charter containing the following conditions :

It is further agreed between the parties to this instrument, that the said party of the second part shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say, 25 running days for loading at New York, to be discharged with customary dispatch at port of discharge. And in case the vessel is longer detained, the said party of the second part agrees to pay to the said party of the first part demurrage at the rate of 26 pounds British sterling per day, day by day, for every day so detained, provided such detention shall happen by default of said party of the second part or their agent.

Bills of lading to be signed as presented without prejudice to this charter. Any difference to be settled before the vessel sails. If in favor of the vessel, cash, at current rate of exchange, less insurance. If in favor of the party of the second part, by draft of captain upon his consignees, payable ten days after the arrival of vessel at port of discharge.

The vessel having laid out her lay days, presented by her agents a bill for one day's demurrage to her charterers, and so continued to do each day for 11 days; when she was loaded and cleared, and bills of lading were presented to the master for his signature by the charterers, they having neither paid any demurrage nor acknowledged in any way the claim. Had the master a right to refuse to sign the bills of lading till the demurrage was paid? What position can the master take in the event of the charterers declining to say anything about demurrage till their bills of lading are signed?

A. The master was bound to sign the bills of lading as presented, but was entitled to his demurrage before sailing.

2. A vessel is chartered to load a cargo of deals for Belfast, London, or Cardiff, as ordered on signing bill of lading. The cargo is loaded and bill of lading signed for Belfast. Subsequently, and before vessel had moved from her loading berth or in any way commenced her voyage, the captain is requested by both shipper and consignee of

cargo to cancel bill of lading for Belfast and sign new ones for London. The captain refuses and in spite of remonstrances sails for Belfast. Now is the captain justified in this course? Is not the shipper of a cargo of this description entitled to name another port of discharge at any time before the vessel has commenced her voyage? It is understood that such change of destination would in no way entail any additional expense at port of loading.

A. It seems to us that the captain was obstinate and disobliging, but he had the legal right to refuse, the contract being complete on signing the bills. If the charter had simply stipulated for either port at the election of the shipper, the destination could be changed at any time before sailing; but the captain was only bound to go to the port named when he signed the bills of lading. Belfast was then named, and no change could be made afterward except by mutual agreement.

CHARTER PARTY—DEMURRAGE.

3. A chartered a vessel to take a cargo of lumber, with ten lay-days for loading.

The vessel is detained six days over her loading time, and the captain, when called upon to sign bills of lading, claims six days' demurrage. The shipper, without disputing the justice of the claim, or alleging any fault upon the part of the vessel, replies, "I will pay you two days' demurrage and no more; if you do not accept that amount and give me a clear bill of lading, I will not clear your vessel."

The captain endeavors to clear his own vessel, but is informed by the Collector that he is not allowed to give him a clearance unless the manifest is signed by the shipper.

What is the captain's remedy under these circumstances? He is anxious to collect the demurrage which is fairly due him, but cannot get his vessel cleared at the Custom House without surrendering the greater part of it, and cannot afford to go to law to enforce his demand on account of the loss of time involved. Several vessels under such circumstances have submitted to the loss in order to get to sea, but there must be some remedy for shipmasters against such injustice. What is it?

A. The charterer who refuses to clear and thus detains the vessel is liable for such detention, and by the terms of the charter all the cargo he ships is held to meet this claim. The captain may, therefore, await the shipper's pleasure and pay himself to the full value of all that is on board.

4. A chartered a vessel to take a cargo of timber or lumber, the charter party containing the customary clause, "Cash for ship's ordi-

nary disbursements to be advanced at port of loading by charterers, subject to 2½ per cent. commission."

It sometimes happens that masters do not call upon the charterers for any advances, being furnished with money by their owners, or having outward freight money. It is contended by some shippers that they are entitled to collect the 2½ per cent. commission upon the amount of ship's disbursements, whether the money is advanced by them or not.

They contend that the commission is one of the perquisites of the charter, which was taken into account in making it; that as they were prepared to make the necessary advance, they are entitled to the commission whether they make it or the master obtains his money from some other source. In deciding this question, please notice carefully the wording of the clause where the words "as required by the master" are added, as is sometimes the case no such claim is made, but it is contended that when this proviso is not expressed the master is *obliged* to draw his disbursements from charterers, or if he does not do so, should pay them for the use of the money which they are ready and willing to advance him. Is this position tenable in law?

A. It frequently happens that the captain has money in his pocket, and uses it expressly to save the commission to be allowed on such advances as he may require. The consignee or charterer, without some express stipulation to a contrary effect, can only collect his commission on the actual cash furnished.

5. I am the charterer of a vessel loaded for a foreign port and ready to sail. The captain has not sufficient funds to pay for repairs, supplies, etc., and the vessel owners are in the same plight. Conformably to charter I have already made 50 per cent. advance on freight, which, however, only meets by half the charges due. The captain cannot, or will not, raise the amount needed by bottomry bond. What course must I pursue to force him to action of some kind? Have I any means of forcing the vessel to be sold subject to my charter? She is American.

A. The master cannot give a good bottomry bond in such a case, this not being a foreign port. If the owners refuse to provide the funds the charterer has remedy against the ship.

6. A steamship's charter calls for delivery of cargo at rate of say 250 tons per day. Demurrage over and above the lay days to be paid except in case of strikes, etc., or any other cause beyond control of the charterers which may hinder the loading or discharging. The usual general clause excepting acts of God, restraints of rulers, etc., is also in charter. Can the captain or owners under these circumstances rightfully claim demurrage from the charterers because the United States customs system of weighing cargo as delivered outside prevents

discharge at the rate stipulated, consignees being ready and willing to receive cargo as fast as it could be delivered ?

Also, when charter stipulates that vessel shall load and discharge as rapidly as possible by night as well as by day, whose duty is it to arrange for night permit and pay customer's charges for night work on vessels ?

A. The custom house rule if imperative will come within the exceptions which limit the demurrage.

If a vessel undertakes to discharge at night it cannot call on the consignee of cargo for any extra compensation on that account. All increased expenses of a kind properly belonging to the ship must be paid as part of its own disbursements.

7. We charter a vessel, promising to give the captain an advance on the freight to meet his disbursements here. On the amount of the advance we are to receive 5 per cent. commission. As accommodation to the captain he asks us to pay his bills, which we do, amounting to \$1,297.66. We now claim that this is only 95 per cent. of the advance, and that the other 5 per cent. is our commission. Are we not right in so claiming ? The captain thinks we are entitled to only 5 per cent. on the amount actually disbursed for him, although he agrees that if he had asked for \$1,500 he would have had to pay \$75.

A. We agree with the captain, and do not allow 5 per cent. on the commission, that forming no part of the advance under the contract. The advance is \$1,297.66, which with 5 per cent. makes the charge against the captain \$1,362.54.

8. A charters a vessel from B and agrees to give the vessel at the rate of 15,000 feet of lumber per day, but fails to do so, and according to charter party has to pay B the sum of \$35 day by day—so reads the charter. The following clause is printed in the charter party : A to give the vessel the amount of lumber per day, Sundays and legal holidays excepted. Now after the vessel gets on demurrage can B collect for Sundays, or does Sunday and legal holidays cover the grounds while on demurrage as well as during lay days ? And should the master of the vessel make demands for demurrage day by day, or at the expiration of each day ?

A. Demurrage is for the extra time consumed in loading, and if Sundays and holidays are expressly excepted in the lay days, they will not count in reckoning demurrage.

9. A vessel comes from the other side with 600 tons of iron. Charter party stipulates 16 days for loading and discharging. Of these 12 have been consumed loading, thus leaving four days for dis-

charging. Of course this is not sufficient to discharge the 600 tons, hence the questions: Cannot the vessel claim demurrage, discharging as fast as she can, for days consumed over and above the four days left her? Is the master obliged to put on extra force of hands?

A. Where no provision for the payment of demurrage is in the bill of lading, no such charge can be made against the consignee of the goods. *Gage v. Morse*, 12 Allen R., 410. If the charterer has control of the loading and unloading the owner may have a claim on him for detention beyond the stipulated time; but if the work is done under stipulation by the master, and it was possible to discharge within the given time, we do not believe the claim would be allowed.

10. Will you favor us with your opinion as to whether one firm verbally authorizing another to sign a charter party, in which both agree and are admittedly interested, can be held liable as a partner in the transaction, in case of the failure of the party who executed the contract to fulfill the conditions therefor?

A. We do not think such an interest would render the other firm liable.

11. In case a charter party calls for customary dispatch in discharging, and bears no clause exempting either of the signers from the contingencies of war, is any extraordinary delay consequent upon war at the risk of vessel or charterer.

A. The answer depends somewhat upon the character of the act of war by which the discharge is hindered. If by a blockade of the port, the blockade, if effective, dissolves the charter party, without reference to any exceptions it may contain, and thus frees both parties from its obligations. So, at least, it has been held by the New York Supreme Court, and the same principle has been assumed in the English courts. If the delay is caused by a temporary embargo, the execution of the contract is suspended by the force of that intrinsic circumstance. If war breaks out, and the voyage becomes illegal, after the charter is signed, that again dissolves the contract, and leaves both parties free.

12. I charter my boat to a party for a specified time, he agreeing to pay all bills of coal, labor, repairs, wharfage, grub, etc. Can I not protect myself and my boat against the payment of such sales (fearing he should default), by advertising that neither myself nor my boat are

to be held liable or responsible for such claims during said period of charter? If so, how much publicity does the law require me to give in order to exempt myself and boat from the payment of such claims?

A. The owner cannot protect himself against a lien in the manner described, as the law expressly gives it, whether the debt is contracted by the master or the owner, or the charterer, builder, or consignee, or the agent of either of them. The owner must protect himself, either by refusing to charter his vessel to a doubtful customer or requiring security to indemnify himself.

13. One of our vessels loaded a cargo of sugar in Cuba, and the master on requiring an ordinary bill of lading therefor, was informed by the shipper that certain sugar refiners would receive the cargo at their sugar house in Brooklyn. Accordingly the master proceeded from sea directly to the wharf indicated by the shipper in Cuba, and placed his vessel in a discharging berth. On reporting to the consignees of the cargo he was informed that he must make way for certain cargoes of melado, which the sugar refinery required before it could take the sugar, but they would pay the vessel full demurrage for every day they detained her over and above the customary dispatch for discharging a cargo of sugar. Had the master a legal right to refuse the offer of demurrage (there being no charter party)? And, having been dispossessed of his discharging berth at the refinery, had he a right to take the vessel elsewhere and discharge her under general order, the permit for his cargo not having been taken out by the consignees?

A. The master is not required to wait and accept demurrage. After the legal limit of time has been reached, he can give notice to the consignees and discharge under general order. It is always better, however, to be accommodating, and give all reasonable time for a reasonable compensation.

14. Our parent house in London, England, charters a vessel to proceed to this port and there take in cargo of deals. The vessel arrives here consigned to us, but the captain does not report himself. Is there a law compelling him to do so, or is it our business to look after him?

A. We know of no special law compelling the master to report his vessel to the charterer, but it is quite plain to us on general principles that he is bound to do so. It is his duty to give notice to the consignee of his arrival with cargo, and the analogy is too strong to leave it doubtful that he must also report the arrival of his ship, where that alone is consigned. It

was substantially so held in the case of *Ledget v. Williams*, 4 Hare, 456.

15. A steamer collides with a fishing smack at sea, and the smack sinks. Admitting the blame to be on the side of the steamer, which raises and repairs the smack, state if the steamer is liable for cargo under following circumstances: The smack was loaded with live fish in a well; the well was not touched or injured by the collision, but their hatches were not secured, consequently they floated off and the fish escaped. Also, is the steamer liable for delay or demurrage to the smack, which was bound into port? Also, is the steamer liable for sailors' personal effects?

A. The contributory negligence which would relieve the vessel at fault from her liability it is said must be connected with the cause of the collision (*Mills v. The National Homes*, 1 Bond, 352; *West. Ins. Co. v. The Goody Friends*, ib. 459; *Kilby v. Thompson*, 1 Low, 125; *Chamberlain v. Ward*, 21 How., 539). In this case the fact that the hatches were not secured had nothing to do with the question of collision, and cannot be called contributory negligence. Damages for delay or demurrage are recoverable, except where full damages for a total loss are awarded. The authorities on this point are too numerous for citation, and they also generally declare that in measuring the damages all the direct and immediate consequences are to be considered, that we have no doubt the loss of sailors' personal effects would be included.

16. If a vessel has been chartered to arrive, say on the 20th of October, with the clause "Now lying in the harbor of Liverpool to proceed to Baltimore with dispatch," and such vessel only left Liverpool on the 19th of November, is the merchant bound to accept the vessel, knowing from subsequent statements that on the 20th of October the vessel had not yet finished discharging, and that, as per Maritime Register many other vessels sailed from Liverpool before the 19th of November? The captain states that he took in a cargo of salt as ballast, which was only completed on the 19th of November. Had the captain a right to detain the vessel so long in Liverpool if the charter does not mention anything in this regard, but only "to proceed with dispatch?" Does not the clause as above imply that the captain had no other action to take than to proceed with dispatch, and was he consequently at liberty to load salt for about twenty days? Furthermore, had he a right to discharge yet on the 20th of October?

A. There is nothing more vague in the announcement of a vessel's movement than the phrase "with dispatch." Ships are

continually advertised to load and sail "with dispatch," even before they have begun to discharge. In the case cited, if the owner or his agent knew the facts, he can hardly be said to have acted in good faith; but the terms are so proverbially ambiguous that we doubt if the merchant can throw up the charter on this account.

17. Will you kindly inform us whether when option of canceling charter party is given to charterers should vessel not be ready for cargo at a stipulated date, charterers retain that option until vessel is ready for cargo, or whether the charterer must declare his intention 24 hours after notice of arrival of ship in port?

A. There is unfortunately no well settled rule on this subject. In our judgment the charterer can legally hold his option and reserve his decision until he is informed that the vessel is ready for cargo.

18. Who loses on account of rainy days, in a case where a vessel is chartered with 25 "running" days, to load cotton, and the captain refuses to receive on account of wet weather? The charter party specifies demurrage to be paid if detention is caused by default of the charterer. Is he, the charterer, responsible for rain, or is it the misfortune of the vessel?

A. The stipulation as to "running" days throws the risk of the weather upon the charterer. The time runs through Sundays and holidays, storm and sunshine alike. The captain need not receive the goods in stormy weather, and such are the misfortune of the shipper. This is easily avoided, if the ship-owner consents, by substituting "working days" for "running days." The charterer must then have his 25 days (or whatever the limit is) of good weather in secular time.

19. A ship is chartered by A for a voyage from Liverpool to New York for a lump sum. A afterward recharter a portion of the tonnage to B; B loads the vessel in accordance with his contract with A. The vessel after being loaded remains in Liverpool an unusual time, and against the protest of B, being as alleged libelled; the result being that on account of delay in departure of the vessel B suffers heavy loss. The question is, who is responsible to B, the vessel and owners, or A, with whom B contracted?

A. There have been too many nice distinctions drawn, dependent upon the terms of charters purporting to let the entire

ship, to make it safe to define the liabilities of the parties in such a case as the above, without details, including copies of all documentary evidence. It may be said, however, that if the terms of the charter party constituted the charterer owner for the voyage, and B's contract was with him alone, then A alone can be held responsible to him. But if the entire control and management of the ship remained with the owner, and the master issued bills of lading to B for goods shipped, in the absence of any other circumstances, not brought to our notice, to rebut the conclusions authorized by these facts, the owner may be held directly to B.

20. Will you kindly give us your opinion in an early impression on the following point relating to charter parties. Assuming that A in a British port concludes a charter to B in America with the following clause: That B has the option of canceling or maintaining the charter provided the vessel does not arrive by a given date. The vessel does not arrive until after that date and B cancels the charter and the vessel is chartered by other parties. Is A entitled to claim his commission for chartering, seeing that the vessel has failed to carry the cargo for which B required her?

A. The contract is concluded and mutually accepted, and A both in law and by custom is entitled to his commission, whether or not the vessel arrives in time.

21. A vessel is chartered to be cleared on or before the 10th of August. Charterers do not hand in papers until Saturday, just before three o'clock, but in time to clear from the Custom House, but not in time to clear from the consul; so vessel does not finish clearing till Monday. Does Sunday count as a demurrage day?

A. Where the stipulation is to load and clear in a given time, the claim for demurrage will hold not only until the date when the vessel has finished loading, but also until she has had ample time to clear. If there was not time to finish clearing on Saturday, the charterers must pay one more day.

22. The bark *Adriatic*, under charter, finished loading late on Saturday, 4th inst. (the days for loading expiring on Friday, 3d inst.) The cargo and vessel are cleared Monday. Is the vessel entitled to demurrage for Saturday only, or for Saturday and Sunday?

A. The demurrage ceases when the vessel is loaded. As this was on Saturday, she can claim but one day. It is her misfortune that the next day was Sunday.

23. In chartering vessels to freight lumber it is generally stipulated by the charterer that he will deliver the lumber to the vessel at the rate of 15,000 feet per running lay days (Sunday excepted). Suppose a vessel should be given a proper berth at a dock where her cargo was piled, and a stormy season was to set in, lasting more or less for two weeks. As the lumber would injure if loaded in the rain, could the charterer be held responsible for time lost on account of bad weather, and would it make any difference if the vessel had been stopped by the charterer from loading in the storm, fearing if she continued the cargo would be damaged? Is the vessel not bound to receive a cargo in proper weather?

A. If the lumber was on hand and ready for delivery, the fact that the vessel could not properly receive it on account of the storm would not involve the charterer in any claim for demurrage. If the charterer ordered the vessel to desist when she might have been loading, he would be liable to that extent.

24. A chartered a vessel to bring cedar wood, sugar, honey, etc., from a port in Mexico to New York. The charter party reads as usual: "and for discharging in New York quick dispatch." The vessel in question arrived June 30. Invoice and bill of lading were delivered to A in the afternoon of July 1. Entry was made July 2, and permit was received on board on the 3d, in the morning. The 4th and 5th were holidays. Four vessels which had arrived a few days previous, were at the wharf awaiting their turn for discharging; in consequence thereof A's vessel did not get into a berth until July 7 in the morning, and began discharging at noon of same day, and finished on the 13th of July. The vessel is about 200 tons register, but loaded 395 tons cargo. It takes generally four or five days to discharge a vessel of 200 tons. One afternoon the mate of the vessel stopped the stevedore for about three to four hours. All the cedar arriving at this port is discharged at the inspector's wharf, foot of Seventh street, E. R., the usual storage place for wood, as it is impossible to sell a log of cedar stored at any other place. The captain now claims five days demurrage, which A refused to pay. Is the vessel entitled to any demurrage, and if so, to how many days?

A. In our opinion there has been no unnecessary delay, and the vessel has had all reasonable dispatch in discharging the cargo. We decide that no demurrage is due.

25. A shipper engages room on a vessel for goods to be delivered by lighter. The goods are ordered to be delivered, and the shipper loads a lighter with dispatch.

The stevedore who loads the vessel represents that he is waiting for the goods, and, to insure prompt delivery, the lighter is towed to the vessel, the delivery being accomplished with unusual quickness.

The lighter could have been discharged in one working day, but the vessel delays receiving the goods for three days after that time, and the lighter-man makes a claim on the shipper for demurrage. There is no dispute as to the facts stated above. The question is, who is liable for the demurrage?

A. It seems to us that the demurrage would be a fair claim against the ship under such conditions.

26. Will you kindly furnish your views on the following question, caused by the new custom of masters of freight steamers chartered for a direct voyage from American Atlantic ports to a port in Europe, of stopping at Sydney, C. B., for coals without giving previous notice to the shippers of the cargo of their intended deviation from the voyage laid out?

1. Is not the steamer obliged to have a full supply of coals and supplies to meet the necessities of an average trip to the port of destination? And is not this obligation caused by the clause, "said steamer being tight, staunch and strong, and in every way fitted for the voyage, proceeded to ———, there to load a full cargo of grain, and being so loaded, shall therewith proceed to discharge at a safe port in ——— as ordered."

2. Does the clause inserted in charter parties, "Steamer to have liberty also to call at any ports or port for coals and for other supplies," refer to any other case than one of necessity occasioned by the dangers of the sea, and does it give the master the right to deviate from his route at his pleasure?

A. As far as the vessel is concerned, the clause in the charter party giving her permission "to call at any port or ports for coal and other supplies," would free her from all liability if she stopped at Sydney or any other convenient port for this purpose.

2. If there was no such clause in the contract, we do not think the custom is so well established that the steamer would have the right to call at an intervening port, as a matter of course, for her supply of coal. But any unexpected delay, or sea peril, rendering the prosecuting of the foreign voyage perilous without a further supply than the original outfit, would justify the deviation and absolve the steamer from liability.

CONSIGNEE.

27. Given, a bill of lading from a foreign port for say, "A B 100 cases of brandy, 12 bottles each," and stamped above the captain's signature, "contents unknown."

1. Has consignee of goods the right to examine such cases that he

may deem light, this examination of course on wharf in presence of master of vessel ?

2. Finding one case to contain but nine bottles, has he a just claim upon the vessel for the three bottles short ?

A. 1. The consignee has a right to examine the goods before receiving them.

2. If our correspondent has any proof that the packages were full and in good order when they were shipped, he has a fair claim on the vessel for the deficiency, which can only be met by evidence that the goods were delivered precisely as received. In the case cited there is reasonable ground for the belief that the missing bottles were taken by some person connected with the ship, or through their negligence, and in such case the ship is responsible.

28. Suppose I ship merchandise to a foreign party, and while it is on the wharf in transit from the vessel to the warehouse it is destroyed by fire ; the consignees had not provided insurance covering the risk on the wharf, and now assert that insurance could not be procured. Who should suffer the loss, the consignee or the shipper, who pays a commission for the care of his interest ?

A. If the consignee was instructed to insure in transit, he must show that he failed after using due diligence, or he is liable. If he had no such instructions he is not responsible.

29. A vessel arrives in port laden with a general cargo. For the convenience of the ship's owner or agent, her cargo is at once discharged under general order, and allowed to remain on the dock for the space of 48 hours before being sent to warehouse. Suppose the dock takes fire and the goods are burned up, who is responsible for the loss ?

A. If the discharge takes place before the consignees can be legally compelled to receive their goods, or be held responsible for their safety, the ship would be liable ; after that the consignee on due notice of discharge is responsible.

30. Please inform me whether the master of a ship discharging goods from a foreign port has a legal right to send to public store after 6 o'clock p. m., cargo remaining on the wharf which has been discharged all day. And having sent such goods to the store, is it his duty to insure the same against loss by fire ? And is he in a position to compel consignees of cargo to pay all expenses incurred thereby ? Or, what is the proper and most effective method of compelling con-

signees of cargo to receive their goods when landed? And they failing to remove their merchandise, how then can a shipmaster keep the wharf clear?

A. The master would have the legal right to send to the public store goods legally discharged and remaining on the wharf all day, the consignees having had due notice; and he is not obliged to insure them; but it is wiser to be a little patient, keep the goods protected, and save the consignees the extra expense.

31. A sells B a quantity of iron to arrive to be delivered at a designated wharf. The vessel with the iron arrives, but there is no berth at the wharf named. Whose place is it to furnish a berth, the buyer or seller?

A. If the receiver cannot wait until there is a berth disengaged, he has the right to designate another wharf to which the vessel must proceed. It is the part of the harbor masters to provide the vessel with a berth.

32. A charter was made with the owner of the brig Lord Dufferin, then at Belfast, Ireland, to load, etc., and "being so loaded shall proceed to within the harbor of New York or Baltimore, and deliver the same (cargo) in regular turn as directed by the consignee or his assigns." Penalty for non-performance is named at £50. The ship arrived at New York on or about the 1st day of November. The 2d day of November being a closed day, on the morning of the 3d of November the consignee sent orders to the ship's agent for her discharge, stating that the permit would be found at the place designated by the consignee for discharge, to which answer was returned to the consignee "all right." The consignee entered the cargo at Custom House, paid duty and sent permit to the place of discharge as stated to do. On or about the 6th of November the consignee found the ship had not reported to discharge, and applied to the ship's agent to know why? Answer was returned to the consignee that the ship had gone to Baltimore. Upon arrival of the ship at Baltimore the consignee offered to receive the cargo there upon the ship's paying the extra expense which was 60 cents per ton. The captain refused to allow any expense, and demanded a place to discharge. Whereupon the consignee received the cargo under a protest served upon captain and agents of the said ship, claiming the damage sustained. Meantime the Government made seizure of the said ship for evasion of the laws in not entering at the port of New York, and assessed a fine upon the said ship.

The questions are: Was not the ship by her charter bound to deliver at New York upon her arrival and receiving orders? And is she not liable to the consignee for damages incurred? Is not the fact precedent that the Government held the ship by law bound to enter at

New York, and fined her for evasion of the law, conclusive as to the rights of the consignee to recover? The cost of delivery of the cargo from Baltimore was 60 cents per ton more than from New York, where the consignee engaged to deliver the cargo upon the arrival of the ship at New York.

A. If the facts affecting the case are all stated, we think the ship is liable to the consignee for the damages thus sustained.

33. A vessel is chartered in New York for an unfrequented port in Cuba. The bills of lading call for the freight to be prepaid in New York, ten days allowed for discharging cargo, and demurrage \$50 a day.

Five days are consumed. Is the shipper at this port liable for that demurrage?

A. It has been settled (Abbott on Shipping, 8th edit., 303; Dixon's Law of Shipping, 217) that where a special provision is made in the bill of lading for demurrage at the port of delivery "the person claiming and receiving the goods under the bill of lading is answerable for the paying," and not the person who shipped the goods.

CONSIGNOR.

34. A merchant agrees with the agent of a New York steamship line upon a through rate on timber, to be shipped by river steamer to Jacksonville, thence on by ocean steamship. The transfer at Jacksonville involved a delay of several days, during which the timber remained on the wharf of the New York steamship. To make up a last shipment, a lot is shipped from the way station, with orders to delay its shipment until followed by a further parcel. Accordingly, the timber is stacked on the wharf as usual, when a fire breaks out in broad daylight and the timber is, together with other goods, either consumed or thrown into the river. This happened close to the New York steamship, which also sustained damage. No insurance is effected on the timber. Who has to bear the loss?

A. If the orders to delay the shipment were given by the shipper, as would appear to be the case, the storage of the timber upon the wharf was in the nature of a gratuitous bailment, in which the bailee is held only to ordinary care. If the fire occurred, therefore, while the steamship company was exercising such care over the property, and not through negligence on their part, they are not responsible for the loss.

MISCELLANEOUS.

35. A vessel lies at a dock and pays wharfage, but to insure greater safety in moving, fastens a line to another dock adjoining.

What may the wharfinger of the second dock rightfully collect of vessel for this line tied to his wharf per day ?—half, quarter, or less wharfage, or nothing ?

A. Only a personal inspection of the dock and the situation of the vessel would allow a positive answer to this question. If the line fastened to an adjoining dock prevented the occupancy of it by another vessel, then full wharfage ought to be paid for the privilege. If it did not interfere at all with the use of the dock, then a merely nominal sum would be a fair compensation for the privilege. And between these two extremes, the proportion of the dock which was occupied would regulate the charge.

36. Can an American buy and give an American hailing and new name to a foreign built vessel wrecked in American waters, sold by order of American or foreign underwriters ?

A. An American citizen may buy the wrecked vessel, but he cannot secure an American register for her until she is repaired by a citizen of the United States, nor unless the repairs are equal to three-fourths of her cost when so repaired.

37. Please give international law as to shipment from this country or England, under the flag of either, of articles contraband of war, for a belligerent whose enemy overhauls them on the high sea. Can the "contraband" be seized ? and how about the balance of cargo and vessel ? An English steamer puts into blank port with contraband bound to an enemy's port. Can blank port seize them ? or in either case can they only be seized in attempting to run a blockade ? and if so, how about balance of cargo and vessel ?

A. Contraband of war expressly designed for a belligerent, may be seized on the high seas, or in the ports of the other belligerent, but the remaining cargo, the property of an innocent party, is not liable if bound to an open port. All property, vessel and cargo, seeking to evade an actual blockade, is liable to be confiscated if caught in the act.

38. A steamship discharges her cargo upon the regular wharf of the company ; no part of the goods is removed on account of delay caused by the Government weighers. Supposing the wharf gives way under the pressure of the load, who is responsible for the damage ? Has the marine insurance anything to do with it ?

A. By the phrase usually contained both in the English policies and our own, marine insurance continues on cargo only

"until landed," or "safely landed." If the policy in the present case, therefore, is in the usual form, the insurers will not be liable for the loss. Neither does the ship continue responsible for damage to cargo after its delivery on the wharf, the consignee having been duly notified, unless it should appear that the wharf was not a safe place for such delivery. But as the consignee is bound, as between himself and the ship, to remove his goods as fast as they are delivered from the vessel's side, it is doubtful whether a delay in their removal, for which the ship was not responsible, would extend the owner's liability. Recourse can only therefore be had, it would seem, against the owner or lessee of the wharf.

39. A customer in this city buys from me 100 barrels of Virginia flour, and requests me to mark them and ship per brig Blank to Cuba. He is to pay cartage in New York city, but I am to pay the freight from Richmond. On arrival I ship as directed, but before I can hand him the invoice and shipping receipt the brig Blank is destroyed by fire. On whom does the loss fall? Will it make any difference if the shipping receipt is in my name instead of his?

A. Delivery of goods by the seller to a carrier, in accordance with the specific request of the purchaser, is a delivery to the purchaser. *Glen v. Whitaker*, 51 Barb., 451; *Bradley v. Wheeler*, 4 Rob., 18; *Hills v. Lynch*, 3 Rob., 52. The goods are, therefore, at the risk of the buyer, and if he has made no provision for their safe delivery, and the brig cannot pay for them, the loss falls on him. It will make no difference in whose name the shipping receipts were taken, if the delivery was for the buyer.

40. Vessels loading at this port are not unfrequently obliged, owing to their draft of water, to drop down from the city loading berths to positions in the river or harbor where there is more water, in order to complete cargo; lighterage in such cases has always been paid by the vessel, the matter only now having been called in question. Will you please give your opinion on this point, and also any law applicable to such cases, should you know of any?

A. A letter from the same correspondent, subsequent to the above, adds that "there is plenty of water at our wharves, the shoals being some miles lower." If we had not been asked for a law applicable to the case, thus calling for a search, which we have made without finding any, we should have answered at once,

as we do now, that we consider the question to depend wholly on the contract of affreightment, or charter party. If the agreement is to load so many tons of cargo, without reservation, we think it must be interpreted to mean that the vessel shall take it from the wharf, or if she cannot do so and get to sea with it, on account of shoals, her master or owner must be at whatever expense may be necessary. Some shipmasters, who have their eyes opened to their liabilities in this respect, make a reservation in their contract to relieve them in case the depth of the water shall be insufficient.

41. The owners of a foreign vessel under libel for salvage in an American port desire to give security for her release, but as the case may not be decided finally for several years, are reluctant to place the funds either in the hands of a merchant (to guarantee him in giving personal stipulation) or in the hands of the clerk of the court, who is liable to removal. Now, have not cases occurred where the district judge will receipt for amount in the name of the United States, depositing it in his turn with the United States Treasurer, to be held subject to the judgment finally rendered in the case?

A. The owners might pay the amount into court, and the judge will order it invested or deposited where it will be secure.

42. Be kind enough to inform me whether a pilot's responsibility over a trans-atlantic steamship, destined to New York Harbor, commences at the moment he is taken on board, or after such steamship has passed the first light ship?

A. Where no offshore or outside pilotage is paid, the pilot only has charge from the inshore line, and is only responsible for that.

43. Are small steam yachts on the small lakes in this State, subject to the navigation laws of the United States, or of this State, (N. Y.)—yachts which are used for pleasure purposes only?

A. Vessels or yachts wholly on inland lakes not open to commerce, are not subject to the United States revenue laws. They are subject to certain of the State regulations, which apply to all the lakes and rivers in the State.

44. A schooner loaded at New York for Richmond with salt, and on arrival here some of the salt was found damaged by sea-water, and the captain consulted a ship-broker as to what was best to be done in regard to the matter. As a settlement of the damage by sea-water it

was agreed by ship-broker and owner of the salt that the vessel pay a certain sum, and that all salt damaged by dirt or from neglect on part of the vessel the vessel would pay for. The captain of the vessel was aware of this agreement, and after discharging nearly all the salt, some 300 sacks were found damaged by dirt and neglect, and the owners of salt made an offer to the captain to settle the damage by dirt and all other causes at a certain sum, which the captain agreed to. After making this settlement the captain told the ship-broker, but he took no steps to stop it, and the damaged salt was taken out of the vessel and part sold and delivered. After the vessel had been discharged three or four days, the ship-broker called on the owners for a settlement and said captain had no right to make any settlement with them as he (broker) was the agent for the owner of the vessel. The ship-broker never informed the owners of the salt that he was agent for owners of vessel and that all settlement must be made with him until after all the salt was out the vessel, and the owners of salt claimed that as they had always settled matters of this kind with captains where terms could be agreed upon, they considered the contract binding, and as they had not been informed as to who was the agent or owner of vessel, the salt owner refused to make any other settlement. The salt owner can prove that the settlement they made with captain was less than the damage amounted to, and never regarded the ship-broker as the owners' agent or captain's agent, but simply regarded him as assisting the captain to get his business straight, and to prevent the owner of salt from taking undue advantage of the master of the vessel. Please let us know if the captain's contract will stand in law, or can it be upset?

A. The captain has authority in behalf of the owners to settle all claims against them on the vessel, growing out of its usual employment, while he is in command, at all places where the owners have no general agent. The solution of the above depends upon two questions of fact. Had the ship-broker authority to act as general agent of the vessel? and were the consignees who made the bargain with the captain aware that the broker held such an appointment? If these questions are answered in the affirmative, the ship cannot be held to the bargain. But if not, and the consignees make the bargain with the master in good faith, and the agreement itself was an equitable one, we see no reason why it should not stand.

45. A buys a vessel of B, and receives a clean bill of sale, after search at Custom-house for any claims against vessel without finding any. Fifteen months after, C presents bill against vessel to A for payment. Is A or vessel bound to pay the bill? Does search of title of vessel protect a buyer as search of title of real estate?

A. The custom-house is not as good a place as the County Clerk's office to search for the record of a claim against a vessel. Even if none was filed there, the purchaser might still be held for a lien on the ship, and especially in other ports where the vessel may have left a record against her. A bill against a vessel may not be a good claim, but if it is, a mere change of ownership will not extinguish it.

46. If a contract is made for goods, say April shipment, the goods being put on the lighter 28th April, and through some obstacle do not reach the ship till after May 1, is the buyer bound to accept the cargo, or has he a right to cancel the contract? Does the word shipment mean the moment the goods leave shore in a lighter, or the moment the goods are on board the ship?

A. To constitute an April shipment, the goods must be placed in possession of the ship, *i. e.*, subject to its control or within reach of its tackles, during that month. If the master of the ship will acknowledge delivery on the lighter as delivery to him, and sign a receipt as of that date, it would technically be within the contract, but otherwise it would not.

47. We have a schooner discharging lumber at a bulkhead. It being necessary to lay head on, and to secure her we had to run lines from each quarter to the docks on both sides. Now the bulkhead and two piers are leased by three separate parties, and each one claims full wharfage. Are we bound to pay more than a full day's wharfage for every day that we lay there?

A. Wharfage is collectible (we quote the statute of 1860) "from every vessel that uses or *makes fast* to any pier, wharf, or bulkhead, within the cities of New York or Brooklyn, for every day or part of a day's use of the same." By a strict construction of this statute, our correspondents seem liable to pay a day's full wharfage to each pier or bulkhead owner or lessee.

48. If I deliver measurement goods (cases weighing about 7,900 pounds each), for which I have engaged room on a steamship, on the deck of a canal boat alongside the steamship, or the steamship's dock, in readiness to go alongside the vessel and bring my goods within easy reach of the ship's tackle, must the steamship company accept this delivery, or can they demand delivery *upon* their dock? Are there any legal or customary limits to the charges of stevedores for taking goods from canal boats on the docks? If a canal boat is chartered for a certain trip and no special agreement made, is its delivery complete by

merely stopping alongside the appointed dock and getting its freight ready for discharge, or must it place the goods *upon* the appointed dock?

A. Questions relating to delivery to the carrier have generally been decided with reference to the responsibility of the carrier for the safe carriage and delivery of the merchandise. So far as we know, text books and decided cases are silent as to what constitutes sufficient delivery to bind the carrier to accept the goods. Equity seems to require that placing them within reach of the ship's tackle, whether on the wharf, or on a barge alongside, should be enough. But usage is an important element in determining the question, and if it is the established usage that all merchandise shall be delivered on the wharf, we suppose that would make such delivery obligatory. It would also be necessary to prove a usage to make delivery to the consignee complete by mooring the boat to the wharf and giving him notice, for without such a custom, clearly established, the cargo must be discharged upon the wharf, but there are customary charges, dependent upon the class of goods.

The wages of stevedores are not regulated by law.

49. CHARLESTON, S. C.—Has any legal decision been given defining the responsibility of a tow boat ahead of a vessel for damages? If so where to find it, and if not what is such responsibility, especially as it relates to towing up rivers and through bridges?

A. The principal decisions say that the tug is responsible for the navigation of both vessels. (*The Merrimac*, 2 *Surv.*, 587; *the W. H. Clark*, 5 *Biss.*, 307; *The Mabey v. Cooper*, 14 *Wall*, 212; *Sturgis vs. Bowyer*, 24 *How.*, 110, etc.) Another decision, however, is that a tug will not be responsible for damages done by her tow except it can be proved that the injury was owing to want of care or skill on the part of the tug. (*The Express*, 1 *Low*, 258.) Where the tow is lashed to the side of the tug and depends upon it entirely for motion, the responsibility is wholly with the tug. (*The Olive Baker*, 4 *Ben.*, 173; *Philadelphia, etc., R. R. Co. vs. The J. H. Gautier*, 5 *Ben.*, 469, etc.) The tug is liable for damages occasioned by taking a tow round a dangerous point with a long hawser. (*The Cayuga*, 16 *Wall.*, 177). But where the accident to the tow was occasioned by a

sudden gust of wind the tug was held not liable. (The Lady Pike, 3 Biss., 113,) or where the damage was caused by a sudden and unexpected sheering of the tow. (The Stranger, 1 Brown Adm., 285; the Angelina Coming, 1 Ben., 109.) Where a steamer undertook to tow a barge, and ran the barge on a sunken pier, the master of the tug being aware of its existence, the tug was held liable for the loss. (Cunnie v. The Deer, 4 Ben., 352; Home Ins. Co. v. The Mollie Hopler, 4 Am. L. T., 145.) So where the tow struck against a wharf (The Workmen, 1 Low, 504). These and other similar decisions are scattered through the various United States and States Court Reports.

OWNER.

50. We are the owners of a small interest in a steamer worth \$5,000. She, through the carelessness of her officers, sinks a vessel worth \$100,000. Can we be held for damages beyond the value of our steamer?

A. The act of Congress of 1851 limits the liability of ship-owners for any loss, damage, or injury by collision occasioned or incurred without the privity or knowledge of the owner to their interest in the ship and her freight then pending.

51. If a foreign ship contracts bills for stores and outfits, and seller takes agents' notes and receipts bills, and the agents subsequently fail, can the vessel be held liable?

A. In transactions of this kind there is usually some evidence that the intention of the parties was to furnish the supplies on the personal credit of the agent, or at the time of settlement to discharge the vessel from all obligation, and to accept instead the personal liability of the agent. But if there is no evidence whatever of such intention beyond the mere signing of the note, and the supplies were obtained in such a way as to create a lien on the ship in the first place, the taking of the agent's note in settlement will not discharge it, and the vessel can be held if the note is not paid. The brig Nestor, 1 Summer's Rep., 72; the bark Chusan, 2 Story's Rep., 155.

52. In July, 1876, the captain and owner of a British schooner, then in this port, bought a lot of provisions in the vessel's name, giving in payment an order on his consignee, which was dishonored. In the

summer of 1877 the vessel having changed owners in the meantime, returned to this port and was not molested, though the seller of the stores knew of her arrival. She again returned and was libelled for the debt.

If the vessel is clearly liable for the debt contracted by her former owner and was not released by the failure to libel in 1877 we will advise her owner to pay without contest.

A. The acceptance of the order on the consignee did not extinguish the lien, unless such was the manifest intention of the material man. (The Chusan, 2 Story C. Ct., 455 ; Harris v. the Kensington, 8 Am. Law. Reg., 144 ; the Gate City, 5 Biss., 200.) The lien given by the State law is lost by the departure of the vessel from the State, but here the vessel being foreign the general maritime law, and not that of the State, governs the case. (The Chusan, *supra*.) Nevertheless the line of a material man must be taken advantage of within a reasonable time after the debt was due or it will not be enforced against a *bona fide* purchaser without due notice. "Generally a lien of this character should be enforced soon after the expiration of the first voyage, after supplies or materials furnished, and it is only under peculiar circumstances that it will be extended beyond such time." (The General Jackson, 1 Sprague, 554.) In the case just cited, there was a delay of two years, and there was opportunity, monthly, to enforce the lien. We think there can be no doubt that if the change of ownership had not occurred until after the first return of the ship in 1877, the lien would have been discharged as to the present owner. In Leland v. the ship Medora, 2 Woodb. and Minot, 104, it was held that liens for wages should in no case extend beyond the next voyage, if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. But if there was no opportunity to enforce the lien, after the dishonor of the order, before the sale of the vessel, an equity exists in favor of the material man which may perhaps overcome the effect of his neglect to pursue his remedy in the summer of 1877. We very much doubt it, however, and we incline to the belief that the lien on the vessel no longer exists.

53. Do the receipted bills of a vessel known as *vouchers* belong to the master or owner ? Also, can an owner compel a master to deliver the receipted vouchers to him in case of a settlement ? Again,

if a master leaves a ship, and is in possession of the receipted vouchers, how is an owner to prove payment of the various bills, or any bill, should it be presented for payment a second time?

A. The master not being the charterer of the ship, and the owner being responsible for the payment of its bills, the vouchers are the property of the latter upon settlement of the master's accounts, and their surrender can be compelled by legal process. It might be less expensive, however, in case of a suit to collect claims already paid, to call the master as a witness, on a subpoena requiring him to bring with him the receipted bills.

54. We have been for the past year receiving from Hamburg, through a certain steamship company, a large quantity of glass-ware, packed in cases or crates, and we always found that for causes unknown to us, the breakage of goods received by said line was excessive, and above any proportion to similar goods brought over by other steamship companies or sailing vessels, and yet we had no redress against said company, as their bill of lading contains the clause "not accountable for breakage." Two weeks ago, a lot of 49 cases came in, and 11 cases of the number were taken out of the steamer, the boards of the cases smashed in and the cases falling almost to pieces, and showing apparently that some extra heavy packages had been piled on top of them, and leaving no doubt that the breakage of the packages must be very exorbitant. Our cartman declined to receive the said 11 broken cases without specifying on the receipt required from the company, "received in bad condition," a remark which the delivery clerk of the company refused to have on the receipt, and our cartman had consequently to leave the goods in the hands of the steamship company. We have offered to the company to receive the goods in their present condition, to take them to our place of business, have them unpacked, the cases put in good condition, and the service glass-ware repacked again, and all these operations to be done under the supervision of one of their operatives, and that they should reimburse us for the value of the breakage resulting from utter carelessness on their part; but all our endeavors have been in vain, as the agent here pretends that he has no authority in the matter; that he has to refer it to his company in England, and here the matter stands. We need the goods, but we do not want to take them unconditionally, as we believe that the company is responsible in such a case. Inform us whether we have any rights in the matter, and what course we have to pursue.

A. The facts stated being duly established, the company is responsible for the damage. You can sue for the detention of the goods, or receive them and prosecute for the damage.

55. The schooner French was lost off Green Run, Virginia. The captain was sailing her on a share, he receiving 60 per cent. of the

earnings and agreeing to furnish men and provisions, or in other words to victual and man the vessel. There was saved from the wreck about \$100 worth of material, which was sold on the shore, the wreckers claiming and receiving one-half for salvage, the owners giving the balance to the captain. The mate and cook have since claimed that there was due them for services rendered prior to the loss of vessel some \$75 each. Please inform us where the liabilities cease so far as the owners individually are concerned. And is there any statute law holding the owners responsible for said wages? Or is their claim good only as against the vessel? Neither of them made any claim on the material or proceeds.

A. The owners are liable for seamen's wages not by virtue of statute, but by general maritime law. Their remedy is threefold, viz.: against the master, the owner, and the ship. (Dixon on Shipping, etc., 327.) The mate and cook might have laid claim to the proceeds of the wreck material, but their neglect to do so, whatever effect it might have had if there could have been subsequent purchasers or incumbrancers without notice, we think could not in any way affect the liability of the owners.

56. An invoice of merchandise was shipped via Stonington line to Boston. Part was delivered to the consignee in Boston, the balance was never accounted for. The presumption is that it was on the steamer which was sunk. The steamship company claim that in accordance with an old United States statute they are liable only for the amount the vessel sold for. What are the shippers' rights in this matter?

A. Section 4283 of the United States Revised Statutes reads as follows:

"The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing lost, damage or forfeiture done or occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Section 4285 provides that the ship owner may free himself from all further liability by transferring his interest in vessel and freight to a trustee for the benefit of claimants.

57. I was agent of several vessels, one of them the captain run on five-eighths lay, he paying all port charges. Last December he left

the schooner, informing me that all the bills were paid. I have received a bill for towing while he was in her (on lay), the parties claiming it was never paid. It was certified by the mate (who was lost in the schooner Alex. Young). The bill was sent me in September, 1876, and I gave it to the captain, who said he would see it paid. The vessel we sold January 5, 1878, and every bill we knew of paid, and the money divided. If the bill had been returned last year I should have made the captain pay it. Can they collect, and from what parties, the late owners or the late captain? Can the late owners have any redress of the captain for the bills he left unpaid; if so, how?

A. "Owners of a vessel are not liable for supplies for navigating and victualing the vessel furnished the master, who is sailing her on shares, for he is owner *pro hac vice*." (Tucker v. Stimson, 12 Gray, 487; 5 Gray, 596.) Abbott on Shipping, 11th ed., p. 27, also takes the position that "the question in such cases is one of principal and agent, and he only, whether owner or charterer, or intended purchaser, by the authority of whom, as his agent, the master gave the orders, is liable upon them." These conclusions may perhaps be defeated by positive evidence that the bills were contracted on the credit of the owners and the vessel; on this point, of course, we cannot speak. But even in that event, the master is liable, and can be made to pay the bill at last, even though it should be first collected by following up the lien on the ship itself.

58. Can parties collect from owners after the loss of the vessel, such bills as come under the head of port charges, viz.: Towage, pilotage, commissions on freights, etc., or insurance on advances to captain to pay port charges, when the vessel is sailed by the captain on half shares?

A. If the ship was formerly chartered by the master, rendering to the owners a half share of her earnings as the hire, it appears that they might not be liable personally, but if, as more likely was the case, the master's relation to the ship and owners was the usual one, except that he was paid by receiving a share, the owners as well as the master remain personally liable after the loss of the ship for the obligations incurred in the usual course of her employment.

59. A steamer which suffered general average on her trip to this port, landed a shipment of ours in damaged condition.

1. Are we obliged to look over every piece of goods to separate

the sound from the damaged, and must we keep broken packages of sound goods at invoice prices, even though they do not command same price as original packages?

2. Have we to contribute the great amount of labor it involves to overhaul a shipment of ours, without remuneration?

3. Could we be obliged to keep all damaged goods at an appraisal, although a market for such goods could be found by auction only?

4. If a shipment is damaged to a certain percentage, have we a right to abandon it, and would the market price of the goods here or the amount insured with addition of duty and freight be the sum we are entitled to?

A. 1. It is the duty of the assured to separate the damaged goods from the sound, as they can claim loss under a policy of insurance only for the damaged portion; and their claim will be upon the insured value as fixed by the policy for that portion.

2. The assured must perform the necessary labor to prove their claim.

3. If the appraisal is not satisfactory to the assured, they have the right to sell the goods at public auction to prove their claim, unless otherwise provided for by the policy.

4. There can be no abandonment of the goods to the underwriter after arrival at destination, or for simple damage. An abandonment must be made while the goods are in peril of a total loss, and it must be then sustained by a loss of 50 per cent. If the underwriter is willing to accept an abandonment of the goods by mutual arrangement with the assured, the assured will be entitled to claim as for a total loss of the damaged portion, at the valuation fixed by the policy, and the underwriter will be entitled to the goods or the proceeds thereof, with all the benefits of the return duty.

If the claim is against the vessel in the nature of "general average," the consignors are entitled to claim the sound market value of their goods at the port of destination.

60. In the absence of a stipulation, has a vessel the right to compress cotton?

A. We know of no judicial decision on this point, and in a litigated case of the kind, the intention of the parties would have to be gathered from the custom of the port, the previous transactions, if any, of the parties, and the rate of freight agreed

on. Where it has become the common practice at the port for the ship to send the cotton to the press, and a higher rate would be made for unpressed bales, these circumstances must be taken into consideration in endeavoring to interpret the actual contract, and in the absence of evidence that the shipper would suffer any damage, we are inclined to think would be held to form, by implication, the basis of the agreement.

61. Are the owners of a ship liable for damages done to freight by shipworms, which bored through new cases and the merchandise in them?

A. The United States Court for the Second Circuit, Judge Nelson, decided this question in the case of the *Miletus*, 5 Blatch., 335. The Court said: "The rule must be regarded as settled, in this court, that damages occasioned by vermin on board of a ship, to cargo, in the course of a voyage, are not the result of a peril of the sea, or any of the dangers or accidents of navigation, within an exception to that effect in a bill of lading, but are damages for which the ship and its owner are liable, as insurers of the safe conveyance of the cargo.

62. 1. Is a merchant bound to receive goods brought to the place of destination so deteriorated during the course of the voyage, as to be of no value to him, or is he at liberty to abandon the same to the ship for freight?

2. Will passing entries at the Custom House by the consignee without his knowledge of the condition of such goods, constitute his acceptance of the same, and affect the abandonment—it must be borne in mind that in accordance with the laws of the port of discharge the delivery of goods or cargo is made at the public wharf, and the landing cannot be proceeded with before the necessary documents are passed by the consignees at the Custom House—and on landing, can he only ascertain the condition of the goods?

3. Can a merchant abandon certain goods for the freight, say, for instance, potatoes (spoiled) and accept others, say, for instance, flour (sound), although shipped by one party, and in one bill of lading?

4. If a ship is chartered for a specific sum for the voyage, and the charterers relet her or take freight of various descriptions from various parties, and some of the goods are landed at the port of discharge in a rotten condition, and are abandoned for the freight, who bears the loss, the ship or the charterers?

5. Is there any difference between the American and English laws, bearing on the above points? If so, state such.

A. A very simple answer will solve all the questions: "Since the shipowner is responsible only for the transportation of the cargo, the freight will be due on its delivery at the port of destination, and in whatever degree goods may be diminished in value by decay, or damage from perils of the sea, and although they may have become of no value on arrival at the port of destination." *Hugg v. Augusta Ins. Co.*, 7 Howard, U. S. Sup. Court R., 595; *Steelman v. Taylor*, 19 Law Rep., 36. The same rule holds in England; and if the goods are refused by the consignee (as with rotten oranges and lemons), and payment of freight cannot be enforced from him, the master can return and collect the amount of the shipper.

63. A received from B an order to ship certain goods, and engaged freight under deck. For vessel's convenience she stows a portion on deck, without A's knowledge, although A learns it before bill of lading was signed. If ship will give clean bill of lading is A justified in accepting it? Or, should he note the facts thereon? If B insured without such knowledge, and insurance company learned the facts, would the company be released on the on deck portion in case of loss? If yes, who suffers loss, B or ship?

A. If goods are stowed on deck without the consent of the shipper, they are not protected by an ordinary policy of insurance, and are at the risk of the shipowner or master. If the shipper knew nothing of this storage before he received the bill of lading, he could hold the ship liable in case of loss, as a clean bill of lading (except for goods which custom or the consent of the owner makes it proper to load on deck) implies a contract to carry under deck. How far the knowledge of the owner concerning the storage before his receipt of the bill of lading, and the absence of his protest against it would be taken as an implied consent we cannot say, as the decision would be governed by the circumstances. If the owner distinctly protested against such carriage of his goods, and held a clean bill of lading, even in this case we are confident the vessel could be held for the loss of the deck load, unless under circumstances that left no distinction between the cargo on or under deck.

64. A has a claim on a schooner for money loaned to repair said schooner; B has a claim on the schooner for provisions furnished. A takes judgment on the schooner and advertises her sale to satisfy same.

Is there a distinction made in claims on a vessel? If the schooner under the judgment does not bring enough to satisfy A's claim what recourse has B? If she brings more than enough to satisfy A, but not enough to pay B, what recourse has B? Or, in other words, does the buyer of a vessel at a judgment sale become as he would under an open sale, responsible for claims on the vessel?

A. If the lender of the money has taken, as he ought to have done, a bottomry or respondential bond in return for the money advanced, his lien on the vessel supersedes all others, except that of seamen for wages. (1 Conkling's United States Admiralty, 290.) Otherwise it seems to be doubtful whether he has any lien at all, but only an action *in personam* against the owner. (The Fortitude, 3 Sumner's R., 228.) In order to determine this question, and put himself into position to enforce his lien, if he has one, the lender must intervene by petition to the court in which the other lienors are asserting their claims; and thereupon the court will order the proceeds of the sale of the vessel to be distributed in accordance with the legal priorities. The sale of the vessel under a decree in admiralty discharges it from all liens or liabilities for the debts of the owner. (1 Conkling's United States Admiralty, 48.)

SALVAGE—GENERAL AVERAGE.

65. In case of a vessel loaded with cotton, hence to Bremen, charter rates 11-32d., bill of lading rates 7-16d., captain's note payable ten days after arrival, given for the difference. Vessel puts into Ireland, refits and proceeds to destination, making a general average. Please inform me whether the vessel should contribute on the amount of charter party or of bills of lading, and if the latter, has owner of vessel a valid claim on the shipper here for his contribution on the difference, as represented by the captain's note, said owner having paid in the larger amount as represented by the bills of lading, which include both charter party and captain's note?

A. We have sought in vain for any precedent or principle on which the shipowner can found a claim to be reimbursed by the shipper for any portion of the contribution made by the freight in the adjustment of general average. The principle upon which the freight contributes is of course the same as that applicable to the cargo; the one is due from the shipowner, as the other from the shipper, because it is his interest at risk. The manner in which the net value of the freight is obtained in adjusting a

general average is in any case a somewhat arbitrary one, and the rule is variable, according to the country in which the adjustment is made. But the text books on maritime law are very emphatic in their statements, that "a foreign adjustment, made at any port at which it ought for sufficient reason to be made, is binding upon all the parties to it." Parsons, Marvin, Dixon, Abbott, and Flanders all agree on this point. Exceptions have been allowed by the courts, both in England and in this country, but we know of none such the principle of which could be made to apply to the case before us. We have no doubt that the charter rate of freight should have been taken by the Bremen adjusters as the basis of their estimates, since contribution was fairly due from net freight only, but we do not think the adjustment can be reopened for that error, admitting it to be such.

66. We have a cargo of 280 tons, more or less, of plaster in vessel at our wharf. The masts of the vessel were struck by lightning on Friday and split so that they will be compelled to put in new ones. The captain claims a proportionable average on the cargo for damages. Plaster is billed to us at 90 cents a ton, and freight \$2.50.

A. There was no sacrifice to call for general average. The vessel being at her destination, the cargo must be discharged and delivered to the consignee on payment of freight. The damage to the masts is not "general average," but "partial loss," and must be borne by the owners of the vessel, unless she is insured against it.

67. A vessel bound for Brazos goes ashore on Brazos Island on entering the harbor. There are 3,000 packages on board, 1,000 of which are landed on the beach. She then gets off and is again blown ashore, when another 1,000 packages are landed. She then floats and attempts to enter the harbor, strikes the bar, and jettisons balance of cargo and is saved. The question is, do the landed goods contribute in general average to jettisoned cargo, and in making the adjustment are the three disasters considered as one? Is there any contribution to the damage to the vessel, nothing having been cut away?

A. In the practice of underwriters here this would be reckoned as one continuous disaster, and all the property saved will contribute to the general average. Nothing having been cut away or sacrificed by vessel there would be nothing to contribute for on that account.

68. Last month we shipped a bill of goods without insurance to a southern customer by schooner. In your shipping news a few days after, I read the schooner had been compelled to put into another port in distress. We have received a note from a down town firm asking us for a bill of items of our goods in order to assess damages for our customer to pay. What is the justice of the law (if there is any) in compelling owners of freight to pay for repairs on a vessel injured while the goods are in transit, and how does their liability as a common carrier differ from a railroad? Were we to refuse to send a duplicate invoice, could we be compelled to furnish it, and what safety is there that unprincipled parties might not furnish bills under the correct amount, and we in sending a correct bill work an injury to our customer?

A. All goods shipped on a sea voyage are subject to the laws of general average. If any of the cargo is thrown over to save the ship, the rest of the cargo and the ship must be assessed to pay for it. If the ship by stress of weather is driven into an intermediate port for repair, all the expenses of entering port, in loading and loading again where this is necessary, and such repairs and refitting as are rendered necessary to complete the voyage, can be assessed on the whole ship and cargo. Where the goods are insured the underwriters pay this charge; where they are not insured, the goods must pay before they are delivered, and this assessment is upon their value. If the seller may not furnish a copy of the invoice the adjusters may examine the property and assess its value.

69. What is the law which governs salvage? What per cent. is it of the property saved, etc.?

A. The principle of law is that salvage in each case is to be governed by its peculiar circumstances. The damage to property, value, risk of life, skill, labor, and the duration of the service, are all to be taken into account, and no fixed percentage or proportion of the value saved or recovered is recognized by any court.

70. A vessel loaded with sugar on her voyage from the West Indies to the United States puts into a port on the coast in distress. She is repaired, without discharging her cargo, and after three weeks' delay proceeds on her voyage. Are the owners of her cargo entitled to compensation, in general average, for the extra loss in weight (over and above the usual loss in weight on the voyage) resulting from the delay produced by going into a port of refuge? Such compensation

is usual when the cargo is discharged and reshipped. As the drainage is likely to be greater in the vessel's hold than when landed and restored, why should not the same usage prevail in the case in question?

A. The extra drainage while the goods remain in the vessel, and it is perfectly natural, not being caused by any disturbance of the cargo, will not entitle the shippers or consignees to allowance in general average.

STATUTE OF LIMITATIONS.

1. I failed in business some eight years ago, and at present see no prospect of paying off my indebtedness. Is there any period fixed by statute law by which my debts are obliterated? There are no judgments against me, nor have I ever been through bankruptcy.

A. The statute of limitations in this State (N. Y.) applies to all debts six years after they are due, if the promise to pay has not been renewed. This only applies to debts held by residents of this State. If our correspondent owes to citizens of other States, and should remove to the place of their residence, he may be sued there, but they cannot prosecute him here after six years.

2. Is a note given on demand in 1860, on which payment has never been demanded, outlawed, or does it still hold good?

A. A note on demand is evidence of a debt then due, and the statute of limitations begins to run from the day it is made and delivered.

3. In 1871 a person residing in this State (N. Y.) borrowed a considerable amount of money which has never been repaid, nor were the debts put in judgment. The borrower removed in 1873 to some western State. Are not the debts still good against him, and until he shall have returned to this State and resided here six years? My attorney advised me that such was the case. Will you give your opinion and possibly a reference or two?

A. The New York statute of limitations is six years. The debtor has lived long enough (probably) in the State where he is at present to avoid legal process there; but if he returns to this State, or can be found at any time within it, he may be served with legal process, and judgment may then be recovered against him.

4. I lent a relative in Boston, May, 1866, \$300. Shortly after he gave me his note on demand, at 7 per cent. No interest or any part

of the principal has ever been paid or demanded, or has the note been renewed. As the party is now worth money, I desire to know if the note will hold good in law?

A. If, since the note was due the party has not resided six years in this State, (N. Y.,) and can now be found at any time within this State, and served with process here, the debt is still collectible. In Massachusetts it is outlawed by the statute of limitations, and he cannot be sued there.

5. What is the law in regard to limitation of debts, especially cash loans? What steps have to be taken to prevent a cash loan from being outlawed, and to renew the liability on such for a number of years?

A. The statute of limitations in this State, (N. Y.,) applies after six years to simple contracts. The simplest method of extension is to obtain a new written promise, as the term will begin to run from the new date. If the debtor refuses this he may be sued and the judgment renewed and continued indefinitely.

6. Suppose an account current between merchants or a principal and his banker, A and B. A renders his account with a balance due B, payable on demand. When does the statute begin to run upon the balance?

A. The statute of limitations begins to run against an obligation when it is due, that is, when the credit expires; but section 386 of the new code provides that "in an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side."

7. A, B & Co. made a joint note in favor of D, due in September, 1871; the note was not paid at maturity, nor was ever suit brought against the maker. After the lapse of eight years, A writes to D that he is willing to pay one-third of the original amount, although the claim is outlawed. Would this written acknowledgment of the indebtedness at this date enable D to bring suit against A for the whole amount of the note, notwithstanding the lapse of more than six years since its maturity?

A. Such an offer would not constitute a revival of the claim so as to take it out of the statute of limitations, if there was in it an express refusal to recognize a further debt, or to renew the

promise of payment. Neither would part payment, under the above offer, revive the remainder of the debt, provided a receipt should be taken "in full of all demands." So decided in *Berrian v. Mayor, etc.*, 4 Robt., 538.

8. A and B gave a joint note for \$200, payable one year after date. A paid the interest for eight years, but has now failed. B never paid any interest, and now claims that the note as far as he is concerned is outlawed, and not collectible from him. Can I hold him?

A. The statute of limitation applies as to B, and the sum cannot be collected of him.

9. Is it true that under the statute of limitations the payment of a mortgage note cannot be enforced after the expiration of six years? I was previously informed that a note accompanying real estate mortgage was good for all time when interest is duly paid thereon. If there is such a rule, does it differ in States, and how would it act in Wisconsin?

A. The payment of interest on a note, or other obligation, almost universally prevents the statute of limitations from running against it, California making the only exception we know of to this rule. In Wisconsin a *sealed* note, if the cause of action thereon accrues within that State, will run for twenty years without a payment, while it is barred in six years if the cause of action accrues without the State, or if it is unsealed. If the note is unsealed, the fact that it accompanies a real estate mortgage will not prevent the statute bar from taking effect in six years upon the note itself when no payment is made thereon; but in this (N. Y.) and other States, the creditor may still have his remedy on the mortgage. The rule is otherwise in Illinois (*Harris v. Mills*, 28 Ill., 44), and in a Wisconsin case, decided by the United States Supreme Court (*Leffingwell v. Warren*, 2 Black, 599), the language of Judge Swayne has been understood to be in accordance with the Illinois decision; but the questions in the cases were not parallel, and the Wisconsin courts themselves, in several cases, have expressly decided that the expiration of the time limited by law for commencing an action on a promissory note does not bar the remedy on the mortgage given to secure such note, by action to foreclose it. (*Whipple v. Barnes*, 21 Wis., 337; *Kennedy v. Knight*, id., 340; *Knox v. Galligan*, id., 470.

10. A customer owes us some money on book account for nearly six years. He made a payment this spring. Does this carry the balance of the account along for six years longer, or must we commence action in order to hold him on balance?

A. A part payment of a debt has always been held to take it out of the statute of limitations. *Whipple v. Stevens*, 2 Foster, 219. But the payment must be made on account of a larger existing debt, and not of a special item or particular debt, and to be effective must not be accompanied with a denial that any more is due. If a book account has been made up and the debt acknowledged, and a part payment is afterward made on account of it, the date is thus renewed, and the six years will begin to run from the date of the last payment.

11. Twenty years ago a stock company was formed to produce oil. They bought 1,800 acres of land in one of the now principal oil-producing districts of Pennsylvania, and the land is now worth \$1,000 per acre. Not being able to commence work they put the property into the hands of a private individual, and into his name, to be held in trust. This party got into financial difficulties and the land was seized (being in his name) and sold. Can it be reclaimed by suit or not?

A. If the present possessors of the land and those from whom they claim have held it for twenty years, we do not think they can be disturbed by any legal proceedings.

12. Thirty years ago a father gave to his son a trust deed of a farm, to remain his as long as he lives. At his (the son's) death the farm was to become the property of the grandson. The trustee never qualified or acted as such, and died 15 years ago, and the grandson has since died; but the father still lives, became involved and mortgaged the farm, and being foreclosed the farm has been sold at sheriff's sale. The party purchasing the same never knew of the trust deed until action was commenced to recover by the son to whom it was originally deeded. Can he recover, and would a judgment dated previous to the mortgage be a lien upon the farm?

A. The statute of limitations would seem to be a sufficient bar to the establishment of the son's title; at all events, an unrecorded deed could not defeat the right of the purchaser under foreclosure sale. A judgment docketed prior to the mortgage would remain a lien in preference to the latter for ten years, after which time, no levy having been made, the lien would be raised in favor of incumbrances or purchasers in good faith.

13. Cr.—Please answer how long it is, according to the laws of Connecticut, before a note becomes outlawed ?

A. If it is a negotiable note, and the debtor is a resident of the State, and the creditor is under no liability to sue, it is barred in six years. But the time during which the debtor is absent from the State is not counted ; and if the note is non-negotiable it will run for seventeen years. If the creditor is legally incapable of bringing an action when the right accrues, he has four years in the case of a sealed instrument, and three in that of a simple contract, after the disability ceases, in which to bring his action.

14. GA.—We have an open account against A, beginning in the year 1871 and ending 1875. The account has never been balanced. The last debit is within a period of four years. We have entered account for suit, and are now informed by an attorney that all of the account which exceeds four years is barred by statute limitation. Laws in Georgia are so numerous, and are altered and amended so often, that we really do not know where we stand. Please give us your decision in this matter.

A. The Supreme Court of Georgia, in the case of Schall v. Eisner (58 Ga. Rep., 190), held that where, as in that case, there were “mutual debts between the parties the statute of limitations would not bar the suit for any part of the account if the last item was not barred.” But though the point does not appear to have been expressly decided by the Georgia Supreme Court, the general rule elsewhere established, is that in order thus to take the items of an account out from the operation of the bar, there must be *mutual* debts and credits, and not a mere demand of one party against the other. So held in Alabama, Tennessee, Texas, South Carolina, New York, Massachusetts, California, and other States, and we presume the rule would be followed in Georgia.

15. ILLS.—How long after the date of sealed instruments before the statute of limitations begins to run in the State of Illinois ?

A. An apparent conflict of authority in the case of the application of the Illinois statute of limitations to mortgages, has delayed our answer to the above inquiry ; but relying upon the Revised Statutes, edition of 1877, we answer that the statute

begins to run on sealed instruments generally from the due date, or that of a payment or new promise, and bars an action after ten years from such period, except in the case of judgments recovered within the State, which may be kept alive 20 years.

16. ILLS.—On the 1st of January, 1867, I took a mortgage (in due form according to the laws of Illinois) for the purchase price of real estate payable in installments all of which were paid as they became due, excepting the last three, which remain unpaid, and were due as follows: March 1st, 1872, March 1st, 1873, March 1st, 1874. At what time will I be prohibited by the statute of limitations (of Illinois), from collecting the same by foreclosure?

A. We have the impression that the limitations for suit upon a sealed instrument in Illinois is twenty years, the same as in this State (N.Y.). At any rate, the lien on the real estate will hold until the bond is paid, and probably long after the patience of our correspondent is exhausted.

17. PA.—What length of time is required by the laws of Pennsylvania to outlaw an ordinary business note made in that State? From some dates I have I am under the impression that an act of the Pennsylvania Assembly dated March 27, 1813, under the head of statute of limitation, plaintiffs were debarred from suing on a promissory note after six years, unless they were "beyond seas," in which case they had only six years after their return. By an act of July 30, 1842, the provisions of the act were not to extend to cases where defendants were "beyond the seas," and that suit could be brought within six years after the return of the defendant. It is my impression that the Supreme Court of Pennsylvania decided that "beyond seas" meant "without the United States." (2 Dallas, 217; 1 Yates, 329; 33 Pennsylvania Statute Reports, 374.) Have you any information showing that a note dated April, 1861, is not outlawed, the maker of the note having been a resident of the State of New Jersey since 1861?

A. It was decided by the Pennsylvania Supreme Court, in *Gonder v. Estabrook* (1859), that the statute of limitations is not prevented from running in favor of a defendant by his residence without the State, unless he is "outside the United States." The note in question therefore seems to be barred by the statute.

SURETIES.

1. As an interested party I would ask as to the law or the custom regarding the responsibility of a co-bondsman; what would the effect be if the directors of a bank knowing of the failure of one of the bondsmen by his bankruptcy proceedings neglected to obtain a substitute?

Are they not bound to have another without delay? Do they not by neglect of their duty in not heeding the public announcement lose both bondsmen?

A. The solvent bondsman might insist on his name being withdrawn, or a solvent party being substituted for the bankrupt, but the bank if it chooses to run the risk may go on with the case as it stands. The solvent man is not released by such a course.

2. A buys a restaurant, paying partly in cash for it and giving notes and chattel mortgage for the balance. B indorses these notes and takes a second chattel mortgage on the business for his security. After a while (six months) B fearing to lose money, forces A to turn over every thing to him (B) by bill of sale, and releasing A from further responsibility by satisfying both mortgages and carrying on the business himself, B also paying A's notes indorsed by B, as they came due, and finally sells the business, keeping proceeds for himself. B claims to have lost money by the transaction and sues A for such. The question now arises: Can B lawfully sue A for any possible damage he may have sustained? or rather, has not B, by securing himself by mortgage, and afterward releasing A by canceling the mortgage and carrying on the business himself, and disposing of it, lost all claim against A?

A. This question cannot be positively answered without exact information as to the terms upon which the business was conveyed by A to B. If the expressed consideration of the transfer was that B should discharge the first mortgage and pay the notes upon which he was indorser, then he has no further claim upon A, even if he did lose money. But unless this, or something equivalent, was the bargain. B may be able to hold A to further liability on the notes.

TAXATION.

1. Can a State tax merchandise imported and on which duty has been paid, as long as said merchandise is sold in original packages? In other words, can a State put a tax on the sale of a case of imported wine when sold in the original package?

A. The Supreme Court of the United States has decided that no State can tax or prohibit the sale of imports in original packages.

2. Has a country merchant (commission or other) the right to receive deposits subject to check at sight, and issue therefor exchange on

New York, free of charge, without being subject to the government tax as a banker, a regular national bank paying government tax being located in the same place ?

A. The Internal Revenue act defines the business to which the tax applies as follows :

SEC. 8,407. Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker.

This is very plain, and if a merchant has a place of business where money is received on deposit subject to be paid upon a check at sight, he comes within the definition.

3. A considerable amount of money owned in New York has been for some time past loaned in Illinois and other western States on real estate security. Can you refer us to a decision in the United States Courts, or in your own State Courts, in which such loans are held not to be taxable in New York, it being supposed that the money is taxed in the States where loaned ?

A. The Supreme Court in 1868, in *The People v. Gardner*, 51 Barb., 352, decided that a resident of this State (N.Y.) cannot be assessed here for money invested on bond and mortgages in Wisconsin and Illinois. And the Attorney-General, in an opinion given as recently as April 24, 1879, quotes this as the recognized law in this State.

4. I have invested \$10,000 on bond and mortgage in Wisconsin, for the estate of a deceased person, formerly a resident of this State (N.Y.). Is it taxable in this State ?

A. In the case of *Trowbridge ex rel. Commissioner of Texas*, 4 Hun., 595, the Supreme Court of this State declared the taxability of North Carolina State bonds owned here, on the ground that they were "evidence of a fixed indebtedness," at the same time exempting shares of foreign corporations as being "simple representatives of capital or property employed in business in other States." The Court of Appeals affirmed this decision. Upon the principles here laid down, and on the statute requiring "all personal property within the State" to pay tax, the bond and mortgage above specified appears to be taxable here. We assume that the heirs or legatees beneficially interested in the estate are resident here.

5. Are corporations liable for State tax whose entire capital is invested in real estate on which they are already heavily taxed by the city? The blanks for returns under the new tax law give no opportunity to deduct for real estate.

A. A case of this kind is one of double taxation, but the new law does not seem to provide any remedy, and on the contrary specifically requires that the real estate shall pay local taxes, while the tax on capital shall be transmitted direct to the State Treasury.

6. I have been rendered a bill for personal tax in Brooklyn. Please inform if it can be legally collected. If so, what constitutes personal tax?

A. Our correspondent must have had notice several months ago that he was assessed a certain sum as personal tax, because this is served on every one thus named in the list. If he was not worth that amount above his personal liabilities, he could have had it reduced, or wholly vacated by a timely call on the assessors. It is now too late, and he must pay it. The rate per cent. is precisely the same as that levied on real estate in the same ward.

7. John Doe owns 30 shares bank stock and real estate free from incumbrance. He gives his note for two thousand dollars, and buys railroad stock. Does this constitute a debt which should be deducted from assessment of bank stock?

A. A taxpayer's just debts are to be deducted at all events, and his bank stock cannot be made to pay tax unless the deduction can be made and leave it as personal property over and above such just debts. A different rule would be at war with the spirit of the recent United States Supreme Court decision, that bank shares must not be subjected to any greater rate of taxation than other property, the Court expressly holding that this prohibition applies to the assessment as well as to the rate of tax.

8. Are the deposits of Savings banks in this city (N. Y.) liable to taxation as personal property of the depositor.

A. All of a man's personal property over and above his indebtedness, not invested in United States securities is *liable* to taxation in this State (N. Y.), but only a small portion of such personal property

is actually taxed, the owners not being required to make any return of it, and the assessors not being very sharp to include it. There is also gross favoritism in this respect.

9. Some 12 years since I was appointed administrator to a small estate, which I closed up and paid over the amounts to the widow and orphans. Somebody now, calling himself an internal revenue collector, in looking over the records of the Surrogate's office, finds I gave bonds in \$15,000, and notifies me there has been no legacy tax paid on said estate. Am I personally liable? The widow is dead and left nothing. I am guardian for the orphans and only have a little.

A. This collector may have overlooked the provisions of the act imposing the legacy tax, "that property passing by will or the laws of any State or Territory to the husband or wife of the person who died possessed, shall be exempt from tax or duty." Also, that any such legacy or share passing to a minor child shall only be taxable on the amount above \$1,000. Only in case the amount which went to the orphans, therefore, exceeded that sum, is any duty payable; but, in that case, hard as it is, the tax is collectible at any time within 20 years after it became due, and the collector may bring suit against the person having custody of the property. The administrator is not personally liable, though as the law made it his duty to pay the tax, we are afraid that if the matter went to suit the court would impose the costs upon him.

10. Is there a law in force in this State (N.Y.) taxing all church property? If not, please state the exemptions.

A. Every building used for public worship in this State, the lots on which they are situated, and the furniture belonging to each of them, are exempt from taxation in this State. Colleges, academies, school-houses, court-houses, jails, poor-houses, alms-houses, houses of industry, etc., are also exempt from taxation.

11. A resident of this city possessing no other personal property than furniture, etc., necessary for his family, can he be taxed if such is worth no more than about \$500? The tax commissioner told me I had to pay, but such ruling is against common sense, as I cannot be without such furniture, while my earnings are hardly sufficient to support my family.

A. All personal property exempted by law from execution is exempted from taxation. If our correspondent is worth no per-

sonal property above his debts but that named in his statement we doubt if the assessors have any right to tax him.

12. I received notice yesterday of a summons from a city marshal to call and pay taxes on my personal property for 1877, with accrued costs for delayed payments. My personal property consisted of effects and furniture to the value of \$500. The tax was charged at \$13 and costs \$3.55. Please inform me if this is correct, and whether no personal effects or furniture are exempt from taxation?

A. The same personal property is exempt from tax as from execution, including a sewing machine, family Bible, pictures and books not exceeding \$50 in value, and in addition necessary wearing apparel, cooking utensils, etc., and necessary furniture, professional instruments, etc., to the value of \$250, when owned by a householder. But it is too late for "A Clerk" to claim this exemption for 1877; he must make it before the assessors at their meetings for the purpose, before the tax is confirmed. Personal taxes in arrears the first day of January after they are payable are increased 3 per cent., and interest at the rate of 12 per cent. per annum (in the case of real property taxes 8 per cent.) also accrues from the time the books are placed in the receiver's hands; in addition to which are the marshal's fees.

13. I am a resident of Westchester county, State of New York, where I resided in my own furnished house a portion of the year including the summer months. In that county I have continually voted, and continually paid school, county, and other taxes on both my real and personal property. For convenience of business I reside in New York during the cold months. Am I in consequence of such residence, liable to pay taxes in New York on personal property?

A. You are not liable to pay taxes if you are not in business here on your own account and own no taxable property here.

14. I loan say \$10,000, taking as collateral security a bond and mortgage duly recorded on a property already heavily incumbered. Can the mortgage on other personal property held as above be assessed to me and taxes collected on the same?

A. The loan is the personal property of the lender, but it and the collateral security cannot be both assessed, thus duplicating the tax on a single \$10,000.

15. Are railroad securities and Government bonds exempt from State taxation in this State (N.Y.), and are they also exempt in the State of Massachusetts? Or, do they come under the head of personal property?

A. United States Government bonds cannot be taxed anywhere in the United States under any State or municipal authority. Railroad securities can be taxed, unless they represent a corporation out of the State.

16. What, if any, is the State tax on incorporated companies?

A. The capital is taxed at the same rate as all other assessed property. That which is invested in real estate is put under a different heading, but both pay the same rate.

17. A firm consists of two general partners, one of whom has money, the other none. The partner having the money in the firm resides out of New York State, and is assessed \$10,000 as personal estate at the place of business. Is it right for the firm to pay the tax, or the partner assessed?

A. We think that there is some mistake about this. The personal property is doubtless entered as that employed by the firm, or the partner assessed, in business here. This tax is usually considered in such a case as a partnership expense, to be borne by the firm.

18. I am taxed for \$20,000 as "premium on United States bonds." That is, these bonds are worth that much over par. Believing it was illegal, and that all money invested in government bonds is exempt, I protested against the assessment and have not yet paid it. Have the assessors any right to do this? I bought these many years since at about par, and they have appreciated on my hands. I trust you will use your able pen against all injustice and oppression on the part of officials.

A. Our courts have decided with the assessors that while the principal of government bonds is exempt from taxation, any premium they may be worth is subject to assessment. In the above case the tax, by his decision, is legally collectible.

19. Owning a farm in another town, should it be assessed to me here or in the town where it is situated, or to the tenant?

A. Real estate of this character can only be assessed in the place where it is located. It is there assessed in the name of the non-resident owner, and is a lien on the property.

20. In Mount Vernon, Westchester county, New York, the village claim that by special act of Legislature, passed for their benefit, the Sheriff of the county is empowered to collect unpaid taxes on property

(real estate), by seizure of and sale of household or other property found on the land. Thus a tenant is made liable for his landlord's indebtedness, and in case of the owner's failure to pay the usual taxes the tenant's property is confiscated to satisfy the village claim. In one instance the working tools of a carpenter, and in another case the horse and buggy of a physician visiting a patient, were seized. The seizure and sale of household effects are of common occurrence. The only remedy a tenant has is to get out of his landlord the amount of his loss, minus, of course, the mortification, expense, inconvenience, and damages consequent upon such an outrage.

Are such proceedings, whether authorized by the Legislature or not, constitutional, and if not, what course is best to pursue in order to obtain redress?

A. The law, applicable to all the State (N. Y.), forbids an action of replevin to recover property seized for a tax, assessment, or fine; and no claim of property is allowed to defeat the seizure and sale of property taken by an officer under such circumstances, though it actually belongs to a third person. We have not found any law on the subject specially applicable to Mount Vernon. But there is a remedy for the injustice specified, and in a case in the Supreme Court (*Fuller v. Allen*, 7 Abb. Pr. Rep., 12), relief was afforded, though with hesitation, by an injunction against the officer, the Court at the same time saying that the party in such a case had an ample remedy by an action for trespass against the officer making the wrongful seizure. If this were not the case, it might be well argued, that the article of the Constitution which forbids the deprivation of a citizen's life, liberty or property without due process of law, would be infringed. It is not "due process of law" to take one man's goods by process against another man.

21. Mr. A died in 1863, leaving a wife and three children; the wife was made executor with another party; the will entitles the wife to the use of the property as long as she lives, then all goes to the children. The wife died in 1867. Do the children have to pay a succession tax on their father's estate, consisting mostly of real estate?

A. If a succession tax was paid by the widow on the real estate, none is due from the children, as it has to be paid but once. Otherwise the tax was due when they became entitled to possession, though its lien on the property is now lost. The tax is also due on the personal estate, upon the amount above \$1,000,

unless the children were minors when they succeeded to it; in the latter case the personal is exempt.

22. A B died in August, 1870. He left a will by which he gave to his wife for life, the use of \$30,000, and after her death this sum was to be divided among his children. Mrs. B died in October, 1872, and it is now claimed that though no revenue or income tax was to be paid by the wife, yet the moment she died the fund became liable in the hands of the children.

A. Legacies passing to husband and wife of the testator are exempt, while in all other cases a tax was imposed.

23. A owns a farm with a hotel on it. B hires it from A. C comes along and stops over night with a horse. A refuses to pay the taxes. Can a collector of taxes levy on the horse that belongs to C and sell it for taxes?

A. Under the law in this State (N.Y.) any goods and chattels in the possession of the person taxed when a levy is made for taxes is subject to seizure and sale. When real estate is rented, and the owner fails to pay the taxes, all the goods and chattels and belongings found upon the estate when the levy is made, may be included in the seizure. The tenant if thus compelled to pay, or if any of his property is taken, has his remedy against the owner; and any other person owning property in the hand of the tenant as bailee, has his remedy against both owner and tenant.

24. Where can I ascertain what class of property is liable to a personal tax in New York city, and what a person can deduct in the way of debts that he may owe or that may be owed to him?

A. The revised statutes, the annual session laws, and the reports of court decisions must all be consulted in order to gain the information desired. In brief, the revised statutes declare that "all personal estate within this State" shall be liable to taxation. What is comprehended under this description has been the subject of various decisions. Capital loaned in other States, the securities being held there in the hands of agents, and any personal property owned within but actually situated outside of the State, have been held to be exempt from taxation. Capital continuously invested here by a non-resident is taxable, but goods merely sent here for sale, the proceeds not to be reinvested, are not. Neither are incorporeal hereditaments, such as the right

to receive wharfage ; nor United States bonds or other securities, or legal-tender notes. But other money in bank or in hand is taxable, as well as debts due from solvent debtors, whether on account, note, bond or mortgage ; municipal or State stocks and stocks in moneyed corporations, including state and national banks, but excepting shares of stock in corporations organized under the laws of other States ; household furniture, silver, pictures, goods and chattels of every description. All debts owed are to be deducted from the amount of taxable personal property of the debtor, but solvent debts due him are taxable, as already stated.

25. What is understood by personal property for which I have to pay tax. Is the money which I have invested in business subject to above tax and at what rate ?

A. The capital over and above outstanding debts invested in business is subject to taxation as personal property, and when legally assessed and placed in the list, is subject to the same rate of taxation as real estate and other assessments.

26. Cr.—Is money loaned on bond and mortgage out of this State, by its citizens, liable to taxation here ? Suppose a taxpayer has handed in his sworn list (as the law directs) to an assessor, and the official should afterwards add to said list as money at interest a sum supposed by him to be thus invested by taxpayer, and should hand to taxpayer a written notice of said addition to his list, 21st of December (one day too late) ; also, if said official was treasurer, and as such held such bonds equally liable with those he had added to my list, and should neglect to properly place and assess them ; also, suppose my son, who has just become of age, should tell him upon his inquiry that he had no estate, and he should then assess him a large amount, what would be the remedy for such grievances, if they exist ?

A. Debts due from solvent debtors are taxable under the law, and the fact that such debt is secured by a mortgage outside the State is not enough to make it exempt. This is our conclusion from the decision in Trowbridge against the Tax Commissioners, where it was held that shares in foreign corporations are not taxable here, but bonds of a State, being evidence of a fixed indebtedness, as a mortgage is, are so taxable. If the taxpayer does not have timely notice of his assessment so as to give him an opportunity to correct errors, the Supreme Court held, in

Wheeler v. Mills, 40 Barb., that the assessors are deprived of jurisdiction, and that the tax cannot be collected. If the assessor wilfully omits taxable property from his list, he is liable to criminal punishment. Any person improperly assessed is entitled to go before the assessors, and to make affidavit as to his taxable property, and thus get an erroneous assessment corrected.

27. IND.—Our board of county commissioners employed an expert to ascertain if any taxables had been omitted from the county tax duplicates as handed to the county treasurer for collection. The county commissioners, upon evidence furnished by the expert, call upon Mr. B for the payment of taxes due on \$5,000 not listed in 1874, predicating the claim upon the following facts: In January, 1874, Mr. B handed to the county assessor his list of taxables (personal property), placing \$5,000 as the valuation, B handing at the same time like list and valuation to the city assessor. The county board of equalization had Mr. B assessed on the tax duplicate the amount as stated on his schedule, \$5,000. Taxes on said amount were paid the county by Mr. B. The expert now discovers that the city board of equalization rejected the schedule of \$5,000 and had Mr. B's taxables placed on the tax duplicate at \$10,000, on which latter amount B paid taxes, and entered protest. The county commissioners now demand of B that he pay taxes on the additional \$5,000 that he paid to the city, but not to the county at the time (1874). Can the claim of the county be collected by law?

A. The Indiana tax laws provide that whenever any real or personal property shall be omitted in the assessment in any year, the same, when discovered, shall be listed and assessed, and the average of tax with 10 per cent. interest, may be collected. If, therefore, the demand in the above case rests upon the omission to list and assess a specific parcel of taxable property, it appears that the tax may still be assessed and collected, no statute of limitations running against such a demand. But if the property was truly listed, and the alleged error consists in too low a valuation, we do not believe that the county board of the assessors have now the power to re-open the assessment.

28. MINN.—Is there any law of exemption on real estate that a mortgage cannot be a lien on all the property covered by said mortgage?

A. The Minnesota law exempts from taxation a homestead of eighty acres of farming land, with the dwelling, etc., or one lot with dwelling in an incorporated town, city, or village. But it is provided that "Such exemption shall not extend to any

mortgage thereon lawfully obtained, but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase money, or some portion thereof; and such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of this State, for work done or material furnished in the erection or repair of a dwelling-house or other building on said land." Bissell's Stat. at Large, Tit. V., sec. 166.

29. PA.—A few days ago a warrant was served on me for the payment of taxes for the years 1877-8. Now, the question arises to me, can a collector of taxes compel me to pay costs on the same, if I had not been notified?

A. The Pennsylvania law contemplates personal notice not only to the taxpayer, but "demand" of payment, before proceeding to enforce collection by distress. See Brightly's Purdon's Digest, vol. 2, p. 1,364.

30. VA.—The Constitution of the State of Virginia says all property shall be taxed equally, and exempts investments in United States bonds; but by the acts of Legislature the market value of the national bank stock is taxed, whether owned in or out of the State, and the bank is required to pay said tax, so that the State may thereby collect the tax from non-residents. Please let me know if it is constitutional to tax the stock of non-residents. The capital of the banks is not taxed, as they have it invested in United States bonds deposited for their circulation.

A. This question is answered in the opinion of the Chief Justice of the Supreme Court of the United States, in the case of *Tappan v. Merchants' National Bank*, in the following language: "The State within which a national bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares." (19 Wall., 490.)

TELEGRAPH.

1. Have the telegraph companies the right to go on the roofs of private buildings in this city for the purpose of stretching and

fastening their wires? Should such be their right under the law, are they not liable for any damage done by their employees to said roofs?

A. They have no right to enter upon the roof, much less attach anything to it without permission of the owner.

2. If telegraph companies once succeed, without my knowledge or consent in spiking a support to my house or store, and running their wires across it, am I thereafter prohibited, under penalty of fine and imprisonment, from removing the incumbrance from my property?

A. Cap. 491, laws of 1870, which forbids any person to "injure, molest, or destroy any of said lines, posts, pier or abutments, or property belonging thereto," under penalty of fine or imprisonment, unless in case of necessity, such as the removal of a house, when the telegraph company must have 24 hours notice. The invasion of private property is in fact thus protected by law. Chapter 471, laws of 1853, provide for compensation to owners of "land" upon which telegraph structures shall be placed, the county court being required, on application, to appoint commissioners who shall appraise the loss or damage. We suppose that telegraph companies will insist that buildings come within the legal definition of the term land, and that the only remedy of the injured householder therefore is an inadequate award of compensation. If such a construction of the law can be maintained, it is no worse indeed than the confiscation of private property for the use of the elevated railroads, but it is no less an outrage, the commission of which upon any merely plausible construction of the statute, or anything short of unequivocal legislative enactment, the courts should interfere to prevent.

3. Is there any law in existence in the United States, or have any decisions ever been given in relation to the following question? A telegraphs an order to B in cipher; the telegram reaches in a mutilated condition, or with an important word different from the one used by the sender, and the order, in consequence, is wrongly executed. Who is responsible or eventually has to bear the loss?

A. The courts have decided that due diligence on the part of the telegraph company is consistent with an occasional error, and that unless gross carelessness, or a want of due diligence can be established, no damages can be collected of the line over which

the message came. Besides, the companies all stipulate that they shall not be held for correctness unless they are called on to repeat the message. As between the sender and receiver, the loss is adjusted by the circumstances in each case.

4. Is a Telegraph Company responsible for loss, arising from a mistake as follows :

A message distinctly directed to New Orleans is sent from New York, on the 15th of December, and is not received in New Orleans until the 18th, the message in the meantime having been sent by the company's mistake to Memphis ?

A. The form of blank upon which Western Union telegraph messages are sent is skillfully drawn to protect the company in cases of this kind from liability beyond the cost of sending the message unless repeated, or fifty times the cost if the message is repeated, and the current of decisions now sets so strongly toward the maintenance of these conditions, when brought home to the notice of the sender, as they are in the Western Union blanks, that we should have little hope of recovering anything beyond the stipulated amount in damages. It is high time, however, that the legislature should intervene and put a limit to the immunity secured by this entire class of one-sided contracts, at least so far as to determine that no one can, even by contract, protect himself from a just degree of responsibility for negligence, either his own or that of his servants.

5. We received orders from several firms for some European goods. As these parties were anxious to get these goods as soon as possible, we cabled for them and paid the amount charged us by the cable company, having paid an additional rate, as the dispatch was intended for Germany. We had still more calls for these goods, and sent, a week later, another dispatch, ordering the manufacturer to send us all the goods he could finish up to a certain time. As usual, we notified the party in Europe by letter that we had sent him an order by telegraph. To our surprise we were notified that they never received the first dispatch, only the second one. Not having received our first dispatch, they sent us goods which we did not want and which are unsalable in this market. Owing to the neglect of the cable company we are heavy losers, as we not only lost the profits on the first lot we had ordered, besides the trouble and annoyance not to be able to deliver the ordered goods, but we have now on hand a quantity of goods not wanted in this market. We applied to the cable company for redress, but cannot get any satisfaction. Is the company not responsible for this neglect ? It is

not an error on their part (they accept dispatches under the condition that to avoid error a dispatch ought to be repeated), but utter neglect to send the dispatch.

A. If this is not in the stipulation as to repeating the message, the company can be held in damages if the neglect can be established ; but it is of very little use to sue such a rich corporation, as the remedy is worse than the original evil. Some time ago it was legally held that the stipulation concerning repeating the message did not apply to a failure to send it, and it may be that the new conditions are so worded as to apply as well to non-delivery as to a mistake in the text.

6. We cabled for a certain line of goods, and on the same day confirmed our order by mail. Our correspondent had the goods manufactured for us in accordance with the mutilated cable he received, but before making us a shipment, he was in possession of our letter. A considerable loss resulting from this transaction, we would like to know if we have to stand it or our correspondent ?

A. There has been no legal adjudication of this question, as far as we know ; but as in this case the sender employs the cable, the latter like a clerk who makes an error, may be regarded, we think, as his agent, and the loss will fall on the employer.

TRADE MARKS.

1. A in Ohio submits us the following: "In the fall of 1876 we went into the business of manufacturing shirts, drawers and other articles, in this State, and adopted the name of 'Peerless' for our productions, using also our monogram in connection with the word 'Peerless' upon our labels. We did not consider it necessary to register the name in the clerk's office, and have used it uninterruptedly until a firm in New Jersey (manufacturers of white shirts) wrote us that they were the only parties entitled to the word 'Peerless,' having registered the same, and that we were infringing upon their rights. Will you please ascertain whether we are obliged to discontinue this word on white shirts, or have we a right under the Centennial decision to use a plain English word as a title by which our goods may be designated?"

A. If our correspondents had used the name as a trade-mark before the New Jersey firm used or registered it, they can continue to use it. But if it was registered when they first adopted it, they have innocently infringed on the right of the other parties and can be stopped in its further use.

2. I gave a tobacco manufacturer in Virginia an order to put me up a quantity of goods to fill an order for a foreign market, and supplied him with my brand (which I own and have copyrighted) to put on the goods in question. On examining the goods sent to me prior to forwarding the same, I found them of inferior quality and not equal to samples or agreement, and rejected the same. Can the manufacturer or his agent sell the damaged lot of goods, to the injury of my brand, or can I compel him to change the brand before he can make a resale, even if at an additional expense to him?

A. If the contract was properly drawn the manufacturer can be prevented from selling the tobacco with the brand upon it.

3. What effect has the decision of the United States Supreme Court on trade marks?

A. It declares the law as far as it applies to trade marks registered at Washington, wholly unconstitutional, and thus wipes out all that has been done under it, leaving our citizens subject to the several State laws and State courts, precisely as if the act of Congress had not been passed.

4. A and B in Vienna manufacture certain goods, and put on as their trade mark "A & B, Vienna." They send their goods *with this trade mark* only to C in this country, but sell the same goods to other parties under any *other* trade mark said parties may elect. A and B subsequently consolidate with other houses (making the same goods) forming a single concern, with A as the head or manager, and continue the same arrangement as to trade mark with the goods of the consolidated company. C registered the old trade mark above mentioned in *his own name* in this country under the United States laws (since pronounced unconstitutional) and has it put upon goods not manufactured by the firm who originally owned it, nor by the consolidated company who succeeded and owned the trade mark of the old firms. Has C any right to use it against the will of the consolidated companies, and of their manager A (whose original trade mark it was) to draw away their business to another house by the reputation attaching to their own trade mark?

A. The trade mark in the above case, being one which indicates the origin and ownership of the manufacture, belongs to a class which is protected by our State laws, and C can be restrained by injunction from an unauthorized use of the symbol, as well as made to respond in damages if any can be shown.

5. A merchant in the United States (B) buys goods of a merchant in Europe (C), which goods bear a trade mark, or label, that a merchant in Europe (D) claims to be an infringement of his own trade

mark or label, but which trade mark or label is not registered in the United States. Can D maintain an action in our State Courts against B for such alleged infringement?

A. If D has introduced his trade marks in this country he can sue in the State Courts for an injunction and an accounting, notwithstanding the want of registry. So decided by the Court of Errors 1846, (*Taylor vs. Carpenter*, 2 Sandf. Ch., 603). The Federal legislation with respect to registry does not take away the common law right of action for infringement.

TRESPASS.

1. I own (or lease for a term of years) a private dock (and grounds adjoining) on the waters of Long Island Sound, the Hudson, or New Jersey coast, remote from any village or town. A steamboat lands an excursion party at this dock and grounds without my knowledge or permission. To what extent is said boat and owners or agents, or which party, liable to me and what is my remedy? Or, should I first notify them that it is my property, and that they must apply to me for permission to use the same?

A. The general principle applicable to the above inquiry seems to have been well stated by appellant's counsel in *Gould against Hudson River Railroad Company*, 6 N. Y., 522, in which it was argued that the riparian land owner "has the exclusive right to the shore down to the water's edge at high-water mark, and the exclusive right of embarkation from his own land, and of using the natural shore as a landing place for his own private profit and convenience, or of erecting a wharf for that purpose." (*Chapman v. Kimball*, 9 Conn., 41; *East Haven v. Hemingway*, 7 Conn., 186; *Bowman's Devises v. Wathen*, 2 McLean, 381.) In *Bird v. Smith*, 8 Watts, 434, it was held that the owner of a private ferry had no right to land boats and passengers even at the terminus of a public highway, between high and low-water mark, on the opposite margin of the river, without the consent of the owner. See also *Post v. Pearsall*, 22 Wend., 425, where similar views were laid down. Our conclusion is, that the right simply to stop at a private wharf on navigable water may not be denied, but without dedication to public use, or legislative grant, no person can use such a wharf to disembark passengers or freight without the consent of the owner.

Such an unlicensed use of it would accordingly be a trespass, for which an action would lie against the owner of the vessel, unless it was under exclusive control of a charterer, in which case the action would be against him. But the owner of the private wharf should first notify the public against using it, or he could not probably recover more than nominal damages—not enough to pay the expenses of a law suit.

2. The next house to mine discharges the water from the front slope of the roof on a shed over a piazza, which in turn discharges the combined droppings through a leader on the sidewalk, a few inches beyond the dividing line, the water therefrom flooding nearly half my sidewalk. In cold weather it freezes, and my sidewalk is half covered with ice from this source. Have I any remedy, and can I compel the owner to divert the flow from my sidewalk, and in case of accident by falling on the ice, who is responsible therefor?

A. The maintenance of a leader or projection which casts water from one person's building upon that of the land of his neighbor, is a trespass, and the latter can compel its discontinuance. In case of accident arising from the accumulation of ice formed on the sidewalk, the numerous decisions imposing liability upon the city, lead to the conclusion that the claim should be primarily against the corporation. (Wallace v. Mayor, etc., 2 Hilt., 440; Rechar d v. Mayor, etc., 2 Daly, 243; Davenport v. Ruckman, 37 N. Y., 568; Morey v. City of Troy, 61 Barb., 580.)

TRUSTEES.

1. A & B are partners. A and wife and B and wife convey all the partnership real estate to C, in trust to pay the partnership debts, and to re-convey what remained after payment of the debts, there being no power of revocation expressed in the deeds from A and wife and B and wife to C. C held the property about three weeks, and re-conveyed the same to A and B. Then A and B on application to the court, had D appointed as receiver, but C was not made a defendant in the matter of appointing the receiver. The court was not aware that a deed of trust had been made to C. Now, will a deed from D, the receiver, pass a good title to the property, and did C, the trustee, have a right to re-convey the property to A and B before executing the trust? Please quote authorities.

A. The rule of law is that where a trustee in such a case accepts the trust, he cannot surrender it or discharge himself of it, without the consent of the *cestui que trust* or direction of the

court, unless there is a power to that effect given in the instrument creating the trust. *Sheppard v. M'Evers*, 4 Johns, ch. 136; *Lewin, Trusts*, 457; *Conger v. Halliday*, 11 Paige, ch. 319; *Drane v. Gunter*, 19 Ala., 731; *Gilchrist v. Stevenson*, 9 Barb., 9; *Lalor, Real Estate*, 195.

2. A trustee for the benefit of creditors, uses ten thousand dollars of the trust fund in Wall street, and makes twenty thousand dollars profit. To whom does this profit belong, the trustee or the creditors?

A. "Trustees cannot make a profit from the trust fund committed to them, by using the money in any kind of trade or speculation, nor in their own business; nor can they put the funds into the trade or business of another, under a stipulation that they shall receive a bonus or other profit or advantage. In all such cases, the trustees must account for every dollar received from the use of the trust money, and they will be absolutely responsible for it if it is lost in any such transaction. By this rule, trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation." Again, "All persons who stand in a fiduciary relation to others must account for all the profit made upon money in their hands by reason of such relation." (*Perry on Trusts*, sec. 429 and 430.)

3. A, as trustee and executor of an estate, loans \$5,000 to B, who fails soon after. The Surrogate decides that A is responsible for the money lost. After the account has been filed in the Surrogate's Court, the legatees demand their money, but cannot get any satisfaction from A, who has in the meantime transferred his real estate to his son. Is this transfer legal, and cannot A be prosecuted for misappropriation of the funds? What would be the best course for a legatee who cannot afford to spend much money in this case?

A. There is a sharp remedy for this case. On petition the Surrogate may issue an attachment against the delinquent executor, and unless the latter can show that the transfer of his property was in good faith, and he is now unable to pay the legacy, he may be locked up.

4. A little boy came to this country 11 years ago and is now within a month or two of his majority. His mother died 18 years ago and

left him a few hundred pounds sterling. The sum was intrusted to a gentleman of means, and the woman's two brothers, A and B, were at her request appointed trustees. The boy now applies to his uncles, reminding them of his coming birthday and asks for a settlement. Trustee B says "I find that I was a minor at the time and am therefore out of court," etc., and to make matters still worse he furnishes the following information: A forged the signature of B, secured and squandered the bulk of the money, and is now bankrupt and penniless. B is comfortably off, but is disposed to repudiate all liability. The gentleman to whom the money was intrusted is also well to do. Does the possession of A's signature and the forged signature of B release said custodian from liability? B having ceased to be a minor and not having relinquished the said trust is he not liable?

A. The payment to one of the trustees by the holder of the fund is a payment to both, and the fact that one of the signatures was forged will not render the custodian liable, if the other signature was genuine.

With respect to B's liability in the above case, we find authority for the following propositions:

1. That infancy did not incapacitate him from being a trustee.

2. That if a trustee is cognizant of any breach of trust committed by a co-trustee and conceals it, or does not immediately take measures to protect the interest of the *cestui que trust*, he will be deemed guilty of a breach of trust himself, and held answerable for the consequences. (Tiffany & Ballard's Law of Trusts and Trustees, 552; Tyler on Infancy, 158; Carow v. Mowett, 2 Edw. Ch., 57.)

Accordingly, that B seems to be liable, at least to some extent, in the above case; exactly how far, it would require further detail of the facts to determine.

5. I have been appointed trustee under a will by the court. The amount is small and the parties are poor. I therefore take this method of obtaining some information in regard to a question that has arisen concerning the trust. I am to invest the sum say, of \$5,000 on bond and mortgage on improved real estate, in New York or Brooklyn. The interest to be paid a certain gentleman during his life, on his death the principal to be equally divided between his children, James, Peter, and Paul, or the survivor or survivors, that is to say, should James and Peter die, Paul would get all of the principal. Now one of the children who is suffering from consumption, wishes to get, say, \$1,000 of the principal; the father and all of the children are willing to sign

a receipt for the amount. Would I be justified in giving him the amount, and what form of receipt should I get to hold me harmless in the matter?

A. We would not advise our correspondent to make the desired disposition of the funds without petitioning the court by which he was appointed, and the investment of the funds ordered. Even with the consent of all the parties, the act might be held to be a contempt of court. A petition should be presented, with the consent of the parties annexed, and an order obtained.

6. Is it legal and the duty of a trustee lending gold or its market equivalent, to stipulate that payment should be made in United States gold coin of the present standard of weight and fineness or its market equivalent, and thus protect the trust funds from that loss or depreciation which payment in lawful money (silver) may produce?

A. It certainly would be legal and highly proper for the trustee to make such a stipulation in the loans from the estate, if he cherished any apprehensions of such a result.

7. Doe conveys land to Roe in trust (among other trusts) to use one-fifth of the rents for Roe's own use; to pay one-fifth of the rents to Roe's wife for her own exclusive use; and to pay one-fifth of the rents to Doe annually during Doe's life. If there is nothing fatal in the provisions of the trust not mentioned, would the trust be good? Can one take a title in trust for himself? Can he for his wife?

A. The trust would be good as to the wife. As to the grantor it would be rather a legal than an equitable estate. As to the grantee the interest could be held by him as against all claimants but his creditors; but it could hardly be called a trust.

USURY.

1. A person sells a note which he has received in the regular course of business to a broker, with his indorsement; in case the maker of the note fails, can the indorser plead usury, as he sold it at the rate of 15 per cent.?

A. A note which is once good in the hands of any holder, may be sold thereafter at any rate of discount without incurring the taint of usury.

2. A owes to B the sum of \$300. B takes A's note at 60 days for \$325, being the principal and a bonus of \$25. Is this paying usury, and can A refuse to pay the note?

A. This is a very plain case of usury. The debtor, A, can refuse to pay the note on that account. Some men are rogues, and the Usury law is operative only to give facilities to the dishonest, and not to protect the innocent. There is one very important thing to be remembered in such a case as the one above described. Where the note is given for a pre-existing debt, the note being void by this defence, the original claim may be revived. A may prove to be a rogue, and refuse to pay that \$325; but if he is solvent he can be made to pay that \$300 which he owed before he gave the note.

3. Section 5,198 of Revised Statutes of the United States provides "in case the greater rate of interest has been paid, the person to whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid," etc.

In a State where the legal rate is 6 per cent. and a national bank receives 10 per cent., what amount could be recovered back in an action (brought within two years)—20 per cent. or 8 per cent.? In other words, is the penalty for usury under the above section twice the whole amount of the interest paid, or twice the amount of the excess over legal interest?

Have any decisions been given by our United States Supreme Court on this point?

A. The law is very clear and has never been disputed here. Section 5,198 declares that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of *the entire interest* which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person to whom it has been paid, or his legal representatives, may recover back * * twice the amount of the interest thus paid." This is in two parts: 1. Where there is agreement to pay a higher than the legal rate, not yet paid, all interest is forfeited, and only the principal can be recovered. 2. Where a higher than the legal rate has been actually paid, twice the said payment, whatever it has been, may be sued for and recovered. In the case above cited, where the national bank has received interest at the rate of 10 per cent., twice the said sum so received may be recovered by suit at any time within two years.

4. Would it be usury to charge 1 per cent. interest, 5 per cent. commission, and $\frac{1}{4}$ per cent. brokerage, in discounting commercial paper?

A. It is usury to charge the borrower anything, even the smallest fraction, over six per cent. for the loan or forbearance of money upon his own obligation. But the discounting of commercial paper which is already a valid obligation against the makers thereof, at any rate of interest with any charge for commission and brokerage agreed upon, is not usurious.

5. MASS.—When money is hired for a specified time, and a note given without interest, (the interest and usury being added to the note,) and a written agreement given to pay two per cent. a month interest after maturity, can the note, the legal interest, and usury, or either of them be collected, if secured by mortgage, under the laws of Massachusetts?

A. Any written contract for the loan or forbearance of money in Massachusetts, between parties capable of making such contracts, is valid, and may be enforced in the courts. Money is free as potatoes in Massachusetts, capital flows thither, no poor man is oppressed for want of a usury law, and everybody but the swindler is satisfied.

WAREHOUSE.

1. Property being delivered by transfer of warehouse receipt indorsed blank, will the following notice, printed on invoice, be of any avail, the certificate having been transferred to a third party for value and without notice of claim stated by original holder? While nominally sold for cash on delivery, and the seller has the right to demand immediate payment, the custom of the trade is to surrender the documents and the amount of invoice the following day.

"NOTICE.—Terms of sale, cash on delivery, and the merchandise hereby billed is not to be deemed and taken as delivered, nor title passed, until paid for without regard to possession.

"JOHN JONES, Consignee."

A. It has been settled in England, not without complaint and criticism, that the assignment of documents there known as dock warrants, warehouse warrants and certificates, does not amount to a delivery of the property until the document has been presented to and accepted by the warehouseman. Mr. Benjamin, the eminent English barrister, and author of the text book on Sales, considers it unfortunate that such a distinction has been

drawn between this class of commercial papers and bills of lading, the transfer of which is equivalent to the sale and delivery of the property, and it is quite possible that our American courts, being free to follow or disregard the English authority, may prefer to adopt Mr. Benjamin's suggestion. Meanwhile, we know of no adjudication by our courts on the exact point involved. If it should be held, in accordance with the English rule, that the delivery of the property is not complete until the warehouseman has consented to hold it subject to the transferee's order, then the vendor's lien, asserted in the notice, would hold good, if enforced before delivery was thus completed, but we think not otherwise.

2. A party places \$7,000 of merchandise on storage and obtains a loan of \$5,000 on the same. The party has disappeared and no trace of his whereabouts can be obtained; the goods are perishable. Am I compelled to hold the goods for 12 months before I can dispose of them to obtain the amount of loan?

A. If the owner of the property cannot be found, and the goods are perishable, the warehouseman should give notice by advertisement and then make the best possible public sale of the whole invoice, retaining the balance of the proceeds, if any, for account of the depositor.

3. If goods landed and placed on any city wharf by a vessel paying regular wharfage remain on dock, and no notice to remove said goods be served on the consignee, or attached to the goods, can any charge for storage be collected after removal of goods?

A. Chapter 320, laws of 1870, authorizes wharf owners or lessees to collect 5 cents per ton on all goods, merchandise, or material remaining on the pier, wharf, or bulkhead, for every day after the expiration of the 24 hours from the time such goods shall have been deposited thereon. It appears to make no difference whether the consignee has notice or not, and the charge is in addition to the wharfage fees due from the vessel itself.

4. Can a warehouseman who has taken goods on storage at usual market rates, without special written contract or verbal agreement, beyond rendering bills and receiving payment for deliveries at such rates, advance prices on goods remaining in store, by giving 30 days' notice of such advance? Is he obliged to store the goods at old rates as long as they are left in warehouse?

A. A man who takes goods on storage, with no specification as to time, has the right to raise the rates of storage on giving notice to the owner, who must take the property away or pay the new charge.

5. How long is a warehouseman required to keep goods before he may legally sell them to pay charges for storage? Is he not bound to advertise a certain length of time for the owner? Also, what course ought he to pursue in case the goods are of little value and have been unclaimed for several years?

A. The safest, perhaps the only entirely safe way in such cases, where no power of sale is reserved, according to the present practice where collaterals are pledged, is to bring suit against the owner for storage, and have the stuff sold on execution. The costs of the proceeding will be added to the judgment and collected with it. Such a proceeding can be taken at any time after storage is due.

WILLS.

1. A dies leaving a will; attached to said will is a statement of "advances" made to his children B, C, and D, "which are to be charged to them on final distribution, and the sums so charged are in lieu of all accounts, notes, and indebtedness." Now B holds a receipt dated about two years after the will was executed, which reads as follows:

"Received on settlement of all accounts between me and my son B, up to ——— one dollar in full. This does not include note against B secured by mortgage. Signed A, June ——— 1878."

Now is this receipt an offset against the "advance" in the statement attached to will?

A. Unless it can be shown that the advances were returned or actually discharged by payment in the settlement referred to, we do not think it would affect the charges attached to the will.

2. Is by law a testator prohibited from leaving to a church more than one-half of his or her property, when the testator has kindred living after his or her death?

A. The statutes of New York forbid any charitable bequest of more than one-half part of the estate, after all debts are paid, where the testator has left living husband, wife, child, or parent.

3. A dies and leaves a will as follows:

I give and bequeath all my real estate to my sons James, John, and Robert, respectively, to be divided in equal shares between them, to them and their heirs forever.

I order and ordain that my above named sons, or either of them, dying without issue, shall give and bequeath his share aforesaid at his option or choice to either of my remaining sons, or to their child or children, or to any one of them.

I order and ordain that no part or parcel of my real estate shall be sold without the written consent of all my above named sons.

Query : Is the bequest to the three sons a deed or gift to them in fee giving them full and complete ownership? Does the order that they shall bequeath the property in a certain way debar them from selling and make their interest a simple life estate? In case a portion of the undivided property be destroyed by fire, would two of the heirs have the legal right to mortgage their share for the purpose of rebuilding?

A. "Conditions that are repugnant to the estate to which they are annexed are absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition which is of such nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute." (Jarman on Wills, ii, 15.) In the case of our correspondent the first clause conveys an estate in fee simple, and the subsequent conditions are in our opinion repugnant and void. The devisees may therefore deal with it as their absolute property, and a mortgage by two would cover and bind their respective interests.

4. A man having no children wishes to will to his wife all his real and personal property, mostly cash. He does not wish to limit her in the use of the money, or even prevent her from selling the real estate, but at the same time he desires that at her death whatever be left should revert to his and not to her relatives, as she had nothing of her own before marrying. State whether he can so dispose, and how the disposition should be worded, to prevent interference with the wife in spending the money while living, and with his relatives in inheriting what she leaves at her death. Also, she being named executrix, are her rights in any way restricted by naming and appointing also an executor?

A. You may leave your property to your wife, both principal and interest to her use, with remainder at her death to the heirs desired. There might be a little restriction on unnecessary waste in the appointment of an additional executor, but nothing, perhaps, to which the widow would object.

5. Can a married man, having minor children, make a will leaving his entire estate (personal only) to his wife? In making her sole ex-

ecutrix is it understood that no bonds shall be required, or must it be so mentioned in the will?

A. A will of the kind described can be legally made, and though perhaps not essential where the executrix is sole legatee, it would be better to insert a direction in the will that bonds shall not be required.

6. A will written by myself would be valid if simply witnessed by my two sisters, who are not mentioned in it as receiving anything, or must it also be acknowledged before a notary, or either or both, and is one person sufficient to name to administer the will?

A. Only two witnesses are necessary to a will in this State, (N. Y.), while in some others three are required. The two sisters would answer, but if the matter is of any importance, the better selection is of persons outside the family. They must sign in the presence of the testator and in each other's presence, and at the testator's request, and these facts should be stated above the signature. It is important that they certify that the testator declared the document, when he signed it, to be his last will and testament, and there is a penalty, in this State, if the witnesses fail to affix their residences to their names. No notary is required.

7. Is a will in a person's own handwriting legal without being subscribed to by a witness?

A. In this State, (N. Y.,) the statute restricts the right of making nuncupative wills to sailors and soldiers in service and in peril. All other wills must be signed by the testator and at least two witnesses, in whose presence the testator must publish and declare it to be his last will and testament.



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